Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974.

No. 73-1908.

STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, BERNARD D. BROEKER, ALBERT M. REED, C. THOMPSON STOTT, IVOR D. SIMS, CROWDUS BAKER, JESS H. DAVIS, THOMAS S. GATES, ROBERT B. HOBBS and GEORGE P. JENKINS, All Being Directors of BETHLEHEM STEEL CORPORATION,

and

BETHLEHEM STEEL CORPORATION,
Petitioners,

v.

RICHARD A. ASH, on Behalf of Himself, and on Behalf of BETHLEHEM STEEL CORPORATION.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONERS.

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STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, BERNARD D. PROEKER, ALBERT M. REED, C. THOMPSON STOTT, IVOR D. SIMS, CROWDUS BAKER, JESS H. DAVIS, THOMAS S. GATES, ROBERT B. HOBBS AND GEORGE P. JENKINS, ALL BEING DIRECTORS OF BETHLEHEM STEEL CORPORATION,

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RICHARD A. ASH, ON BEHALF OF HIMSELF, AND ON BEHALF OF BETHLEHEM STEEL CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS.

OPINIONS BELOW.

The United States District Court for the Eastern District of Pennsylvania granted summary judgment for Peti-

tioners on July 11, 1973, without opinion. The Order of the District Court granting summary judgment is set forth in the Appendix [A87].

The majority opinion of the panel of the Court of Appeals for the Third Circuit reversing the Order of the District Court, and the dissenting opinion of Judge Aldisert, both dated April 16, 1974, are reported at 496 F. 2d 416 [A92]. The Court of Appeals denied a Petition for Rehearing and Suggestion of Rehearing En Banc, without opinion. The Order denying the Petition for Rehearing is set forth in the Appendix [A118].

Prior opinions of the District Court and of the Court of Appeals in connection with the denial of plaintiff's application for a preliminary injunction are reported at 350 F. Supp. 227 and 471 F. 2d 811, and are printed in the Appendix [A46 and A60].

JURISDICTION.

The Court of Appeals for the Third Circuit entered judgment reversing the District Court on April 16, 1974 [A116]. A timely Petition for Rehearing containing a suggestion for rehearing *en banc* was filed by the Petitioners on April 30, 1974, and was denied by Order of the Court of Appeals *en banc* dated and entered May 15, 1974 [A118]. On May 17, 1974, Petitioners filed a Motion for Stay of Mandate pending application to this Court for a Writ of Certiorari, which the Court of Appeals granted by Order dated May 22, 1974, thereby staying its mandate until June 21, 1974 [A123].

The Petition for a Writ of Certiorari was filed on June 20, 1974, and was granted on November 11, 1974 [A125].

The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

Title 18 U. S. C. § 610, a criminal provision recently reenacted and amended in Title II of the Federal Election Campaign Act of 1971 ("FECA"), prohibits corporations and labor unions from making contributions and expenditures "in connection with" any federal election, and provides that an officer or director of any corporation, or officer of any labor organization, who consents to any such contribution or expenditure is punishable by a fine of $1,000 or imprisonment for one year, or both.

The constitutionality of this provision has twice been questioned by this Court, in *United States v. C. I. O.*, 335 U. S. 106 (1948), where four Justices concurred in the unanimous dismissal of an indictment under § 610, on the ground that § 610 is unconstitutional, and in *United States v. International Union United Auto Workers*, 352 U. S. 567 (1957), where three dissenting Justices expressed the view that this Court should reach the constitutional questions presented and declare § 610 unconstitutional, describing § 610 as "a broadside assault on the freedom of political expression guaranteed by the First Amendment", 352 U. S. at 598 (dissenting opinion of Mr. Justice Douglas, concurred in by Mr. Justice Black and Mr. Chief Justice Warren). The constitutionality of § 610 was expressly pretermitted in *Pipefitters v. United States*, 407 U. S. 385, 400 (1972)

The questions presented are these:

1. Did the Court of Appeals err in "implying" from 18 U. S. C. § 610 a private right of action, not otherwise authorized by statute, on behalf of a stockholder and registered voter against the directors of a corporation for a corporate expenditure for advertising allegedly in violation of § 610,

(i) in spite of the grave doubt concerning the constitutionality of § 610, which the Court of Appeals expressly refused to resolve, while at the same time "implying" a private right of action from the statute,

(ii) in the absence of any manifestation in the language of § 610 itself of any Congressional intent to authorize such a private right of action,

(iii) in the conceded absence of any legislative history evidencing Congressional intent to permit such a private right of action,

(iv) in the absence of any jurisdictional provision, such as that relied upon in *J. I. Case Co. v. Borak*, 377 U. S. 426 (1964), conferring federal jurisdiction over the subject matter, and

(v) in view of the clear inference of *contrary* Congressional intent *not* to provide such a private remedy, to be drawn from Congress' provision of a private remedy in Title III of the Federal Election Campaign Act of 1971 and the conspicuous absence of such a remedy from Title II of the Act, which contains § 610?

2. Is the decision of the Court of Appeals, "implying" a supplemental, private right of action from the criminal provisions of 18 U. S. C. § 610, consistent with standards articulated in *National Railroad Passengers Corp. v. National Association of Railroad Passengers*, 414 U. S. 453 (1974) and *T. I. M. E., Inc. v. United States*, 359 U. S. 464 (1959)?

3. In view of the doubtful constitutionality of 18 U. S. C. § 610, did the Court of Appeals depart from settled principles of statutory construction by *expanding* the coverage of the statute to subsume additional remedies not authorized by Congress, instead of *restricting* the scope of remedies for its violation to those expressly provided, and thereby avoiding the question of its constitutionality?

4. May a private right of action, not otherwise authorized by statute be "implied" from 18 U. S. C. § 610 on behalf of a stockholder and registered voter against the directors of a corporation for an alleged violation of § 610?

5. In view of the doubtful constitutionality of 18 U. S. C. § 610 and the rule of construction that where language of an act will bear two interpretations equally obvious, that one which is clearly in accordance with the provisions of the Constitution is to be preferred, did the Court of Appeals err in construing the term "expenditure", as used in 18 U. S. C. § 610, in such a way as to include within the statutory prohibition an expenditure for advertising, which is not in the nature of active electioneering and only incidentally expresses a view upon important public issues, and does not so much as mention the name of any political party or the name of any candidate for election to federal office?

6. On its face and as construed and applied by the Court of Appeals, is 18 U. S. C. § 610 violative of the freedoms of speech, press, petition and association, guaranteed by the First Amendment of the Constitution of the United States?

7. On its face and as construed and applied by the Court of Appeals, does § 610's prohibition, directed only against contributions and expenditures by labor unions and corporations, deprive labor unions and corporations of the equal protection of the laws, guaranteed by the Fifth Amendment of the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

This case involves the First and Fifth Amendments of the Constitution of the United States.

The First Amendment provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The case involves 18 U. S. C. § 610, as amended by Sections 201 and 205 of the Federal Election Campaign Act of 1971, P. L. 92-225, 86 Stat. 3, which are set forth in Appendix A to this Brief.

STATEMENT OF THE CASE.

1. The Background.

An advertisement (the "Advertisement") entitled "I say, let's keep the campaign honest. Mobilize 'truth squads' . . ." appeared from on or about August 22, 1972, until September 7, 1972, in various magazines and in nineteen local newspapers in towns in which Bethlehem Steel Corporation ("Bethlehem") has plants. In connection with the September 11, 1972, mailing of a quarterly dividend to its stockholders, Bethlehem sent its stockholders a reprint of the Advertisement.

The Advertisement was based on a speech (the "Speech") given by Stewart S. Cort, Chairman of Bethlehem. As indicated in the Advertisement, the Public Affairs Department of Bethlehem sent to readers, on request, copies of the Speech and copies of a folder (the "Folder") entitled "How you can help to keep the campaign honest".

The Advertisement, the Speech and the Folder[1] encourage readers to become concerned and informed citizens, by reading books, magazines, newspapers and reports, by identifying the major issues of the day, by watching televised news programs, by listening to the views of political candidates, and by discussing current affairs and issues with friends, neighbors and business associates. Typical of the statements contained in these publications is the following excerpt from the Advertisement:

> "Right now, look at every candidate's declared political programs. Analyze every issue. If you think any of them are faulty, ill-founded, or misleading, prepare your own answers and use those answers to set the record straight. I'd suggest that groups with a deep interest in good government organize programs to encourage responsible, honest, and truthful campaigning. Mobilize 'truth squads,' perhaps.
>
> "One thing you can do is talk in advance with the communications media in your area—newspaper publishers, editors, reporters, radio and television people, and magazine publishers. Alert them to the kinds of false statements that are likely to be made and show them how and why those statements are false or deceptive. Give them the facts. They're likely to take a highly responsible position in reporting what the politicians say if they're forewarned.
>
> "And when outrageous accusations are reported in the media, you ought to refute them immediately. You can do it if you're properly prepared. Plan to attend political functions and stand up when spokesmen are off base. Concerned citizens ought to do this; it's nothing more than true democracy in action."

1. Reproduced as Appendices B, C and D hereto, respectively.

The Advertisement incidentally refutes the accusation of an unnamed "political candidate" that "big business" does not pay its fair share of taxes, by quoting the following statement of Stewart S. Cort, Chairman of Bethlehem:

> "My own company has been tagged with that sort of accusation despite the fact that over the past 10 years our taxes have averaged $37 million a year more than our net income. Our total tax expense was nearly $200 million last year, $155 million in 1970, and more than $1.7 billion for the 10 years from 1962 through 1971.
>
> "So please think twice before swallowing all this baloney about large corporations not carrying their fair share of the tax burden."

Neither the Advertisement nor the Speech nor the Folder mentions the name of any political party or of any candidate for election to any federal office.

2. The Complaint.

This stockholder's action was filed against Bethlehem and its directors in the United States District Court for the Eastern District of Pennsylvania on September 28, 1972, on the eve of the 1972 Presidential election, by Richard A. Ash, Esquire ("Ash"), the owner of 50 shares of common stock of Bethlehem. The original complaint [A8], to which is attached a copy of the Advertisement, alleged that the directors of Bethlehem had authorized an expenditure for the Advertisement and charged that such expenditure was in violation of 18 U. S. C. § 610, as amended by the FECA, P. L. 92-225, 86 Stat. 3. Count II of the original complaint charged that the expenditure was *ultra vires* and illegal under Delaware law. The complaint sought injunctive relief, including an Order that defendants place "corrective advertising at their own expense in national media", and compensatory and punitive damages in favor of Bethlehem, together with costs. In the complaint, Ash also sought an award of attorney's fees. Federal jurisdiction in the District Court was invoked pursuant to 28 U. S. C. § 1331.

3. Application for Injunctive Relief in the District Court.

The District Court denied Ash's application for a temporary restraining order on October 13, 1972 [A19]. Plaintiff's motion for a preliminary injunction was denied on October 25, 1972, after a hearing at which the parties entered into a stipulation (the "Stipulation") of uncontested facts in lieu of testimony. 350 F. Supp. 227 (E. D. Pa. 1972) [A46]. Mindful of the cardinal rule of construction that where a statute is susceptible of two constructions, one raising serious constitutional questions, and the other avoiding them, the Court's duty is to adopt the latter construction, Judge Troutman found that (350 F. Supp. at 232):

> "Plaintiff has failed to prove that there is a likelihood of success on the merits, in that:

> "(a) plaintiff had no private right of action under 18 U. S. C. § 610;
>
> "(b) the expenditures made by Bethlehem Steel Corporation in connection with the advertisement, the speech and the folder are not 'contributions or expenditures' within the meaning of 18 U. S. C. § 610;
>
> "(c) the expenditures made by Bethlehem Steel in connection with the advertisement, the speech and the folder are not 'expenditures' made for 'the purpose of influencing the nomination for election, or the election of any person to Federal office' and hence, are not 'expenditures' within the meaning of 18 U. S. C. § 591 (f)(1);
>
> "(d) *the expenditures made by Bethlehem Steel Corporation in connection with the advertisement, the speech and the folder did not constitute 'active electioneering directed at the general public on behalf of a candidate in a Federal election' as defined in the legislative history to the recent amendment of 18 U. S. C. § 610;* Congressional Record, November 30, 1971, H 11477, 11478;
>
> "(e) to enjoin the expenditures made by Bethlehem Steel Corporation in connection with the advertisement, the speech and the folder would prevent a corporation from seeking an honest campaign and election and refuting a statement made by an unidentified candidate, which is adverse to its interest, thereby giving rise to grave First Amendment issues;
>
> "(f) *under the facts and circumstances of this case, 18 U. S. C. § 610 must be narrowly construed to avoid an overbroad application infringing on a corporation's (and labor union's) First Amendment right to seek an honest campaign and to refute statements on issues of*

crucial concern to it and to the public, thus preventing a public debate on such issues.''

4. Appeal of District Court's Denial of Injunctive Relief.

Ash appealed this ruling to the Court of Appeals for the Third Circuit which, after oral argument, affirmed, per curiam, the order of the District Court denying his motion for a preliminary injunction. *Ash v. Cort,* 471 F. 2d 811 (3d Cir. 1973) [A60]. Ash's Petition for Rehearing was denied by the Court of Appeals on January 31, 1973.

5. The District Court's Grant of Summary Judgment for Petitioners.

Petitioners moved in the District Court to require the posting of a bond for security for expenses, and on March 7, 1973, the District Court entered an Order [A68] granting the motion for security for expenses with regard to the cause of action under Delaware law, alone, directing Ash to post a bond in the amount of $35,000 as security for expenses. At the same time, however, the District Court granted Ash leave to amend the complaint by eliminating the claim under Delaware law set forth in Count II of the complaint, which Ash did on March 19, 1973.

Petitioners thereafter moved for summary judgment on the federal claim in Count I based on 18 U. S. C. § 610, on the grounds (1) that a stockholder has no private right of action for alleged violations of § 610, (2) that § 610 is inapplicable as a matter of law and (3) that § 610 is unconstitutional [A79].

On July 11, 1973, the District Court entered an Order granting Petitioners' motion for summary judgment [A87].

Ash appealed from the District Court's Order of July 11, 1973, granting Petitioners' motion for summary judgment.

6. Appeal of Judgment for Petitioners.

A divided panel of the Court of Appeals for the Third Circuit on April 16, 1974, reversed the judgment of the District Court. Over a dissent filed by Judge Aldisert, the Court below held, in an opinion expressing the views of two Judges of the panel, that a registered voter or a stockholder has an ''implied'' private right of action under § 610, although Congress did not see fit expressly to provide one.

Notwithstanding that four Justices of this Court, concurring in the unanimous affirmance of dismissal of an indictment under § 610 in *United States v. C. I. O., supra,* expressed the considered view that this provision *''cannot be squared with the First Amendment,''* 335 U. S. at 155, and in spite of the view of three members of this Court in *United States v. International Union United Auto Workers, supra* (where resolution of the constitutional questions was postponed), that this statute is a *''broadside assault on the freedom of political expression guaranteed by the First Amendment,''* 352 U. S. at 598, and contrary to decisions of every other circuit which has faced the issue, the majority below adopted the most sweeping, expansive construction conceivable of the term ''expenditure'', as used in § 610, holding that an expenditure by a corporation or a labor union for advertising which does not mention the name of any political party or the name of any candidate for election to federal office may nevertheless fall within the wide dragnet of § 610 [A104-108].

While ''implying'' from § 610 a private right of action, the majority at the same time *declined* to resolve the constitutional issues presented [A108].

On the basis of its construction of § 610, the majority held that remand would be necessary to resolve material issues of fact[2] [A108].

2. The issues of "standing" and "mootness" were also raised and discussed in the majority opinion, *sua sponte* [A94-97]. Al-

In the dissenting opinion, Judge Aldisert stated that the holding of the majority, "implying" a private right of action from § 610, could be arrived at in this case "only by defying the Supreme Court's recent decision in *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* — U. S. — (42 U. S. L. W. 4132, January 9, 1974 (Amtrak)." [A109-110].

Noting the conspicuous absence in Title II of the FECA of any civil remedy, public or private, in contrast with the supplemental civil remedy expressly provided by Congress in Title III of the FECA, Judge Aldisert stated [A112]:

> "I am persuaded that this is a classic case for the application of Amtrak's second principle which teaches: 'when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.' A legislative schema expressly providing for a private remedy in one title of the Act and not in another title would call into play the familiar 'principle of statutory construction [reflecting] an ancient maxim—*expressio unius est exclusio alterius.*' "

The dissent points out that there is "no language in the Act manifesting Congressional intent to create a private right of action by implication" [A112] and that "appellant conceded at oral argument that the Congressional history is devoid of any reference to a private civil remedy." [A113].

2. (Cont'd.)
though Judge Aldisert made reference [A108-109] to his views on standing, as expressed in the dissenting opinion in *United States v. Richardson,* 465 F. 2d 844 (3d Cir. 1972), the dicta of the majority on these topics were deemed unnecessary for decision of the case in the dissenting opinion [A108-109] and are not raised here. The view on standing which prevailed in the Third Circuit at the time this case was decided below was later rejected in *United States v. Richardson,* — U. S. —, 42 U. S. L. W. 5076 (No. 72-885, Opinion filed July 25, 1974).

Adverting, *inter alia,* to the absence of constitutional authority in the federal judiciary to create subject matter jurisdiction for the federal courts, *Sheldon v. Sill,* 8 How. 440 (1850); *Ex Parte McCardle,* 7 Wall. 506 (1869), Judge Aldisert concluded [A115]:

> "[A]n imperative of a detached decisional process commands that neutral principles of construction be employed in all our cases because of the precedential or institutional effect of our determinations. To find an implied civil cause of action for the plaintiff in this case is to find an implied civil right of action for every individual, social, or public interest which might be invaded by violation of any criminal statute. To do this is to conclude that Congress intended to enact a civil code companion to the criminal code. And to do this is to suggest that for every written volume of Title 18 of the United States Code there is an unwritten volume of Title 28.
>
> "Because I cannot begin to accept this notion, I would affirm the judgment of the district court."

The majority of the panel below judicially created a private, civil right of action, not enacted by Congress, for alleged violation of § 610, in addition to the criminal sanction Congress provided, in spite of the absence of (i) any manifestation of Congressional intent in the language of the Act to create such a private cause of action, (ii) any legislative history evidencing Congressional intent to *imply* authorization for such a private right of action, and (iii) any jurisdictional provision, such as that relied upon in *J. I. Case Co. v. Borak,* 377 U. S. 426 (1964) conferring federal jurisdiction over the subject matter and supplying

a basis for implication of a private remedy, and (iv) in spite of the most serious doubt concerning the constitutionality of § 610 (which the Court nevertheless declined to resolve) and (v) in the face of the clear inference of Congressional intent not to create a private right of action, to be drawn from the conspicuous absence of a private remedy from the Title of the FECA containing § 610, as contrasted with the express provision for a private remedy in Title III of the FECA.

Petitioners filed a petition for rehearing and suggestion of rehearing *en banc* for a full, deliberate reconsideration of (1) the holding of the panel in the light of *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U. S. 453 (1974) ["the *Amtrak* case"] [3] (2) the serious constitutional implications of the panel decision, including the constitutionality of 18 U. S. C. § 610, and (3) the impact of this decision in precipitating and authorizing an avalanche of federal-question litigation neither impliedly nor expressly authorized nor contemplated by the Congress.

The petition for rehearing was denied by the Court of Appeals, without opinion, on May 15, 1974.

Petitioners' motion for a stay of mandate pending application to this Court for a Writ of Certiorari was granted by the Court below, by Order dated May 22, 1974, staying the mandate until June 21, 1974.

The Petition for a Writ of Certiorari, filed June 20, 1974, was granted by this Court on November 11, 1974.

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3. This Court's decision in the *Amtrak* case was handed down on January 9, 1974, after the briefs had been filed in this matter in the Court of Appeals. The case was argued before the Court of Appeals eight days later on January 17, 1974. At oral argument, Petitioners relied, *inter alia*, upon this Court's opinion in the *Amtrak* case. Further briefs on the point were not requested by the Court of Appeals.

SUMMARY OF THE ARGUMENT.

I.

Under settled principles of statutory construction, no private cause of action on behalf of registered voters and stockholders for alleged violations of 18 U. S. C. § 610 should be judicially "implied." There is no manifestation of Congressional intent either in the legislative history of § 610 or of the Federal Election Campaign Act of 1971 ("FECA"), as a whole, or within the four corners of the Act, to create or authorize a private remedy. Nor is there any general jurisdictional provision in the FECA, similar to § 27 of the Securities Exchange Act of 1934, relied on in *J. I. Case Co. v. Borak, supra*, as conferring federal jurisdiction over the subject matter and as supplying a basis for an inference of Congressional intent to create such a private cause of action.

On the other hand, Congressional intent to *withhold* a private remedy is clear. Congress expressly provided a private remedy under Title III of the FECA, but provided none under Title II of the FECA, which contains § 610, a circumstance which gives rise to the plain inference of Congressional intent not to create a private cause of action under § 610. The language, structure and legislative history of the Federal Election Campaign Act of 1974, a later statute *in pari materia* with the FECA, throw a "cross light" on the question of implication, confirming that Congress deliberately withheld a private cause of action for alleged violations of § 610, in the words of the Chairman of the House Conferees responsible for the Act, "to assure that civil suits are not misused in a partisan manner and that the complex and sensitive rights and duties . . . are administered expertly and uniformly."

In view of the chilling effect on the exercise of First Amendment rights which would result from implication of

a private cause of action from a statute purporting to prohibit expenditures for speech on public issues there are countervailing reasons of constitutional dimension against implication of such a private cause of action.

II.

Because the "expenditure" provision of § 610 on its face purports to prohibit expenditures for speech addressed to public issues and is, therefore, unconstitutionally overbroad, a narrowing construction should be adopted under the principle that of two equally obvious alternative constructions of a statute, that which clearly comports with the provisions of the Constitution is the construction to be adopted. To avoid serious constitutional doubt, the statute should be construed not to prohibit an expenditure for an advertisement which discusses public issues and does not mention the name of any political party or the name of any candidate for election to federal office.

III.

Section 610 is the paradigm of the unconstitutionally overbroad statute. On its face and as construed and applied by the majority below, § 610 includes within its indiscriminate sweep and makes criminal a broad spectrum of activity protected by the First Amendment. The Court below held, for example, that § 610 may outlaw the making of an expenditure for advertising which expresses views on issues of public significance and does not mention the name of any political party or the name of any candidate for election to federal office. It would even prohibit the making of an expenditure for the purpose of publishing voting records of Congressmen if deemed made for the purpose of "influencing" the nomination for election, or election, of any

person to federal office. This statute is not narrowly drawn. It evidences none of the "precision of regulation" which this Court has said "must be the touchstone in an area so closely touching our most precious freedoms." *N. A. A. C. P. v. Button,* 371 U. S. 415, 438 (1963). It is, in fact, a "broadside assault on the freedom of political expression guaranteed by the First Amendment" and it "cannot be squared with the First Amendment." *United States v. International Union United Auto Workers, supra,* 352 U. S. at 598 (dissenting opinion of Mr. Justice Douglas); *United States v. C. I. O., supra,* 335 U. S. at 155 (concurring opinion of Mr. Justice Rutledge).

IV.

Corporations enjoy a right to equal protection of the laws under the Due Process Clause of the Fifth Amendment and may not be subjected to arbitrary, invidious discrimination. Section 610's complete prohibition of contributions and expenditures in connection with federal elections, however, is applicable *only* to labor unions and corporations. Large, unincorporated business organizations, partnerships, politically potent voluntary associations and vast aggregations of wealth and power are entirely free of its prohibition. No compelling governmental interest justifies this discriminatory, total exclusion of corporations and labor unions, as a class, from the democratic process. There is no feature of the corporate form of organization which distinguishes it, in any way relevant to the discrimination created by § 610, from other partnerships, associations and organizations which are left unfettered by this prohibition. The discrimination created by § 610 bears no rational relationship to any legitimate governmental interest and is a denial of equal protection of the laws.

ARGUMENT.

I. The Decision of the Court Below Judicially Creating an "Implied" Private Right of Action Under 18 U. S. C. § 610, Not Authorized by Congress, Is Contrary to Controlling Decisions of This Court on the Criteria Governing the Implication of Private Remedies From Federal Penal and Regulatory Statutes.

Congress enacted, in the Federal Election Campaign Act of 1971 ("FECA"), 86 Stat. 3, a comprehensive and detailed statutory scheme, broadly regulating[4] numerous aspects of the conduct of federal election campaigns, establishing an administrative procedure for monitoring compliance with the Act and prescribing criminal penalties for violations of its penal provisions. Constituting the first comprehensive federal election campaign reform legislation since 1925, the FECA was apparently the final product of no less than 23 sets of congressional hearings on election reform since 1906,[5] scholarly research[6] and the work of a

4. While the constitutional authority is quite narrow, the power of Congress to enact comprehensive legislation under Article I, section 4 and Article II, section 1 of the Constitution, in the regulation of "[t]he Times, Place and Manner of holding Elections for Senators and Representatives" and "to determine the time of choosing the electors, and the day on which they shall give their votes," in connection with Presidential elections, has not been challenged in this case. *United States v. Classic*, 319 U. S. 229 (1941); *Burroughs and Cannon v. United States*, 290 U. S. 534 (1934); *United States v. Mosley*, 238 U. S. 383 (1915); *Ex Parte Yarbrough*, 110 U. S. 651 (1884); *Ex Parte Siebold*, 100 U. S. 371 (1879).

5. Remarks of Senator Hugh Scott, 117 Cong. Rec. 51913 (daily ed. Feb. 16, 1971).

6. A. Heard, *The Costs of Democracy* (1960); H. Alexander, *Financing the 1964 Election* (1966); H. Alexander, *Financing the 1968 Election* (1971); H. Alexander, *Money and Politics* (1972); H. Alexander, *Money, Politics and Public Reporting* (1960); H. Alexander, *Responsibility on Party Finance* (1963); H. Alexander & J. Bibby, *The Politics of National Convention Finances and*

Presidential Commission.[7]

Title II of the FECA sets forth amendments to criminal statutes, contained in Title 18 of the United States Code, relating to federal elections, including 18 U. S. C. § 610, the statute involved in this case. Section 610 broadly prohibits corporations and labor unions from making contributions and expenditures "in connection with" any federal election, and provides that an officer or director of any corporation, or officer of any labor organization who consents to such a contribution or expenditure is punishable by a fine of $1,000 or imprisonment for one year, or both.

Although the forerunner of § 610 was first enacted more than 65 years ago, in 1907,[8] and although it has, since then, been the subject of intensive reexamination and attention by Congress, and has been amended on numerous occasions,[9] Congress has never seen fit to create a private right of action for alleged violations of § 610 to supplement its penal sanction. In Title II of the FECA, Congress again provided no private right of action under § 610.

It is undisputed that there is no manifestation in the language of § 610, or of the FECA in its entirety, of any

6. (Cont'd.)
Arrangements (1968); H. Alexander & L. Denny, *Regulation of Political Finance* (1966); *Contributions of National-Level Political Committees to Incumbents and Candidates for Public Offices*, 1968 (T. Alexander & C. Jones ed. 1971). See also D. Adamany, *Financing Politics* (1969); D. Dunn, *Financing Presidential Campaigns* (1969); Committee for Economic Dev., *Financing a Better Election System* (1968); Twentieth Century Fund, *Voters' Time* (1969); Twentieth Century Fund, *Electing Congress—The Financial Dilemma* (1970).

7. President's Commission on Campaign Costs, *Financing Presidential Campaigns* (1962).

8. Act of January 26, 1907, c. 420, 34 Stat. 864.

9. Act of March 4, 1909, c. 321, sec. 83, 35 Stat. 1103; Act of February 28, 1925, c. 368, 43 Stat. 1070; Act of June 25, 1943, c. 144, § 9, 57 Stat. 167-168; Act of June 23, 1947, c. 120, Title III, § 304, 61 Stat. 159.

Congressional intent to create or permit a private right of action for an alleged violation of § 610. As Judge Aldisert noted in his dissenting opinion [A113], it is also conceded here that the legislative history of § 610 is devoid of any reference to a private civil remedy.

While no private remedy was provided by Congress in *Title II* of the FECA, Congress, in *Title III* of the Act, did expressly provide a civil remedy, to supplement the criminal sanctions provided in Title III for violations of that Title. Section 308(d)(1)-(5) of Title III[10] expressly sets forth the exclusive method enacted by Congress for private enforcement of the provisions of Title III of the Act. It provides that "any person who believes a violation of [Title III] has occurred may file a complaint with the supervisory officers." Upon receipt of a complaint pursuant to that provision, the supervisory officer investigates and if, in his judgment, any person has engaged in or is about to engage in any acts or practices in violation of any provision of

10. 2 U. S. C. § 438(d)(1)-(5). The text of § 438(d)(1) reads:

> "(d)(1) Any person who believes a violation of *this title* [Title III] has occurred may file a complaint with the supervisory officer. If the supervisory officer determines there is substantial reason to believe such a violation has occurred, he shall expeditiously make an investigation, which shall also include an investigation of reports and statements filed by the complainant if he is a candidate, of the matter complained of. Whenever in the judgment of the supervisory officer, after affording due notice and an opportunity for a hearing, any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this title or any regulation or order issued thereunder, *the Attorney General on behalf of the United States shall institute a civil action for relief*, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which the person is found, resides, or transacts business. Upon a proper showing that such person has engaged or is about to engage in such acts or practices, a permanent or temporary injunction, restraining order, or other order shall be granted without bond by such court."

Title III, the statute directs that the *Attorney General* "*shall* institute a civil action for relief" including injunctive relief.[11]

Against this background it is submitted the dissenting opinion below was correct in its statement that an implied right of action can be found here "only by defying the Supreme Court's recent pronouncement in *National Railroad Passenger Corp v. National Association of Railroad Passengers.*" *Ash v. Cort, supra,* 496 F. 2d at 426 [109-110].

A. The Decision Below Is Inconsistent With the Amtrak Case.

In the *Amtrak* case, the question was whether a private right of action can be implied from § 307(a) of the Rail Passenger Service Act of 1970 ("Amtrak Act") to enforce duties and obligations imposed by the Act and, specifically, to enjoin discontinuance of passenger service on the ground that such discontinuance was prohibited by the Act. This Court held that no such private right of action could be "implied" and reversed the decision of the Court of Appeals for the District of Columbia Circuit.

The principles applied in the *Amtrak* case are directly applicable to this case, and the majority below erred in failing to give effect to them. In *Amtrak,* the Court observed that "respondent has pointed to no provision of law outside the Amtrak Act itself that can be read to create or imply the cause of action that it seeks to bring against the petitioners," 414 U. S. at 456, and that "[i]t follows that support for the bringing of this action must be found, if at all, within the four corners of that act."

Here, as in *Amtrak,* there is no provision of law outside the FECA granting a private right of action under

11. Emphasis supplied throughout, unless otherwise stated.

§ 610, and there is no provision in the Act as a whole, or in § 610, for any such private remedy for alleged violation of § 610. Indeed, under the FECA there is not even a grant of federal subject-matter jurisdiction to the district courts to entertain civil actions to enforce § 610, as there was in § 307(a) of the *Amtrak* Act.[12]

The Court rejected the argument that a private cause of action should be implied from § 307(a) on behalf of the intended beneficiaries of the Act, noting that "the inference of such a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent," 414 U. S. at 458, and that implication of a private cause of action was not consistent with the evident legislative intent:

> "A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' *Botany Mills v. United States*, 278 U. S. 282, 289 (1929). This principle of statutory construction reflects an ancient maxim—*expressio unius est exclusio alterius*. Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, this maxim would clearly compel the conclusion that the remedies created in § 307(a) are the exclusive means to enforce the duties and obligations imposed by the Act.[13]

12. Section 307(a), 45 U. S. C. § 547(a), contains such an express jurisdictional grant:

> "If the Corporation or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this chapter, obstructs or interferes with any activities authorized by this chapter, refuses, fails, or neglects to discharge its duties and responsibilities under this chapter, or threatens any such violation, obstruction, interference, refusal, failure, or neglect, *the district court of the United States for any district in which the Corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States* or, in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives, *to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat.*"

This principle has long been recognized by the Court. *Fleishmann Distilling Corp. v. Maier Brewing Co.*, 386 U. S. 714, 720 (1967); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246 (1951); *Switchmen's Union of North America v. National Mediation Board*, 320 U. S. 297, 301 (1943); *Case v. Kelly*, 133 U. S. 21 (1890); *Ex parte McCardle*, 7 Wall. 506 (1869); *United States v. Wiltberger*, 5 Wheat. 76 (1820); *Marbury v. Madison*, 1 Cranch 137, 174-175 (1803).

This well-established principle finds specific application in those decisions holding that where Congress has expressly provided a particular civil remedy in one title of an act, but not in another title of the same act, it is to be inferred that Congress did not intend there to be a civil remedy in the title in which it did not expressly provide for one. *Calhoon v. Harvey*, 379 U. S. 134 (1964); *T. I. M. E., Inc. v. United States*, 359 U. S. 464 (1959); *cf. Nashville Milk Co. v. Carnation Company*, 355 U. S. 375 (1958).

T. I. M. E., Inc. v. United States, supra, involved the question whether there was an implied private right of action by a shipper against a certificated motor carrier for an overcharge under §§ 216(b) and (d) of the Motor Carrier Act of 1935, 49 U. S. C. §§ 316(b) and (d), which impose on carriers the duty "to establish, observe, and enforce just and reasonable rates, charges and classifications" and

13. 414 U. S. at 458.

which provide that "[a]ll charges made for any service . . . shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful." The provisions involved were contained in Part II of the Interstate Commerce Act. Significantly, the right to litigate as to the reasonableness of past charges was expressly conferred in Parts I and III of the Act, relating respectively to rail and water carriers. Noting that "[t]he very provisions of Part I and their counterparts in Part III, which give a right of action to shippers against carriers for damages incurred by carrier violations of the Act and provide the mechanics for the enforcement of that right are conspicuously absent in the Motor Carrier Act," the Court refused to imply a private remedy under Part II where none had expressly been provided. 359 U. S. at 470.

The application of the rule to this case is clear. Congress expressly provided a carefully circumscribed private civil remedy for violations of Title III of the FECA in § 308(d)(1)-(5).[14] The narrow private remedy thus expressly granted in Title III supplements the penal provision of that Title, § 411, 2 U. S. C. § 441.

By contrast, Title II of the FECA, which includes § 610, *contains no such authorization* for a civil remedy to supplement the criminal sanctions expressly provided in Title II. This omission is a significant manifestation of Congressional intent that the penal sanctions of Title II be exclusive. This inference is buttressed by the fact that what discussion there is in the legislative history of enforcement of § 610 makes specific reference only to the Department of Justice. See 117 Cong. Rec. 43379 (Remarks of Mr. Hansen); 117 Cong. Rec. 43383 (Remarks of Mr. Thompson). The implication of a further, private cause of action

14. 2 U. S. C. § 438(d)(1)-(5).

under § 610 is, thus, inconsistent with the evident legislative intent.

There is no indication of contrary legislative intent in this case which would override this settled rule of statutory construction. The majority below points to no feature of the language or structure of the Act itself in support of its conclusion, and it was conceded in the Court below by Respondent that there is no legislative history evidencing Congressional intent to provide a private right of action for violations of § 610.

In the absence of any such Congressional intent, the decision of the Court below to "imply" a private cause of action from § 610 is an act of pure judicial legislation the reversal of which is required by *Amtrak* and the decisions of this Court in *Calhoon v. Harvey, supra,* and *T. I. M. E., Inc. v. United States, supra.*[15]

B. The Recently Enacted Federal Election Campaign Act Amendments of 1974 "Throw a Cross Light" on Congressional Intent Not to Provide a Private Remedy Under § 610.

On October 15, 1974, the President signed into law the Federal Election Campaign Act Amendments of 1974 ("FECAA"), P. L. 93-443, 88 Stat. 1263, amending the FECA.[16]

15. As Judge Aldisert said [A113] in his dissenting opinion: "Our polestar is Congressional intention. To imply such a right is to presume that Congress intended to provide for such an action, but overlooked its inclusion when the Federal Corrupt Practices Act was originally enacted, and that Congress overlooked it again when it enacted the comprehensive Federal Election Campaign Act of 1971. I cannot impute such derelictions to a Congress vitally concerned in a matter so universally discussed and the subject of manifest, if not all-consuming, public interest." *Ash v. Cort, supra,* 496 F. 2d at 428.

16. Title 18 U. S. C. § 610, itself, was amended in the FECAA only by the substitution in the second paragraph of § 610 of provisions increasing the penalties for violation. See Section 101(e)(1)(A)-(B) of the FECAA.

Although the FECAA was enacted after the decision of the Court of Appeals and is effective January 1, 1975, under an established doctrine of statutory construction it is appropriate to consider the "cross light" which the later enactment, *in pari materia* with the FECA, throws on the intention of Congress in enacting the earlier legislation. *Pipefitters Local Union No. 562 v. United States*, 407 U. S. 385, 427 (1972); *Michigan National Bank v. Michigan*, 365 U. S. 467, 481 (1961); *United States v. Hutcheson*, 312 U. S. 219 (1941); *United States v. Aluminum Co. of America*, 148 F. 2d 416, 429 (2d Cir. 1945) (L. Hand, J.).

With respect to the provision for civil enforcement of the FECA, the new amendments follow the direction taken in Title III of the FECA, which granted a right to file a complaint with the election supervisory officers, with respect to alleged violations of Title III of the FECA. The FECAA makes this carefully limited remedy applicable to apparent violations of the title 18 criminal provisions of the Act, including § 610. The amendments create a Federal Election Commission ("Commission") composed of the Secretary of the Senate and the Clerk of the House of Representatives, ex officio and without the right to vote, and six members to be appointed in a manner specified by the Act. Section 310(b) provides:

> "(b) The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to this Act and sections 608, 609, 610, 611, 613, 614, 615, 616, and 617 of title 18, United States Code. *The Commission has primary jurisdiction with respect to the civil enforcement of such provisions.*"

Section 311 grants the Commission broad investigatory powers.

One salient feature of the FECA is retained in the civil enforcement procedures provided in the FECAA: no

private right of action in the District Courts is granted for alleged violations of § 610. Private civil enforcement is carefully restricted to the right to file a complaint with the administrative agency to which civil enforcement is committed. Section 314(a) of the FECAA, provides the exclusive procedure for private enforcement of the Act:

> "Sec. 314(a)(1)(A) Any person who believes a violation of this Act or of Section 608, 610, 611, 613, 614, 615, 616, or 617 of title 18, United States Code, has occurred may file a complaint with the Commission."

Section 314(a)(2) provides that, upon receiving a complaint, the Commission "shall notify the person involved of such apparent violation" and shall either report the apparent violation to the Attorney General or make an investigation of the violation. Section 314(a)(5), providing for civil enforcement of the provisions of the Act itself, authorizes *only the Commission*, upon investigation, to institute a civil action for relief "in the district court of the United States for the district in which the person against whom such action is brought, is found, resides, or transacts business":

> "(5) If the Commission determines, after investigation, that there is reason to believe that any person has engaged, or is about to engage in any acts or practices which constitute or will constitute a violation of this Act, it may endeavor to correct such violation by informal methods of conference, conciliation, and persuasion. If the Commission fails to correct the violation through informal methods, it may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which the person against whom such action

is brought is found, resides, or transacts business. Upon a proper showing that such person has engaged or is about to engage in such acts or practices, the court shall grant a permanent or temporary injunction, restraining order, or other order."

With respect to violations of § 610, the FECAA provides, in § 314(a)(6), that the Commission "*shall*" refer apparent violations of Chapter 29 of title 18, United States Code (which contains § 610) to the appropriate law enforcement authorities.

Civil enforcement of § 610 is dealt with in § 314(a)(7) of the FECAA, which authorizes *only the Attorney General,* upon request by the Commission, to institute a *civil* action for relief for violations of section 608, 610, 611, 613, 614, 615, 616 or 617 of title 18:

"(7) Whenever in the judgment of the Commission, after affording due notice and an opportunity for a hearing, any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provisions of this Act or of section 608, 610, 611, 613, 614, 615, 616, or 617 of title 18, United States Code, upon request by the Commission the Attorney General on behalf of the United States shall institute a civil action for relief including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which the person is found, resides, or transacts business. Upon a proper showing that such person has engaged or is about to engage in such acts or practices, a permanent or temporary injunction, restraining order, or other order shall be granted without bond by such court."

Appellate review of district court enforcement orders is expressly confined by § 314(a)(9) to orders, entered after a showing that a person has engaged or is about to engage in acts or practices violative of the FECAA or of section 608, 610, 611, 613, 614, 615, 616 or 617 of title 18, United States Code, *granting* a permanent or temporary injunction or restraining order.

The only direct private action in the district courts authorized by the FECAA is an action under § 315 "*to construe the constitutionality of*" any provision of the FECAA or of section 608, 610, 611, 613, 614, 615, 616, or 617 of title 18, United States Code.

These amendments to the FECA reinforce the conclusion that Congress never intended to authorize, impliedly or otherwise, a private right of action under § 610. They show that Congress carefully balanced the interest in civil enforcement and in gathering evidence concerning alleged violations of the criminal code provisions, including § 610, against the necessity of preventing the potential abuses which would result from unrestricted private civil enforcement activities. By limiting the role of private civil enforcement to the filing of complaints with a responsible governmental agency possessing expertise in election matters, Congress harmonized these interests.

This case is virtually on all fours with *Amtrak*. Section 307(a) of the *Amtrak* Act expressly created only a public cause of action maintainable by the Attorney General to enforce the duties and responsibilities imposed by the Act. The only private cause of action created by that provision is expressly limited to "a case involving a labor agreement." In this case, § 610 mentions no private cause of action, and the only private remedy in the FECA, as originally enacted, is a right to file a complaint with the designated election supervisory officers regarding the provisions of a separate title of the Act. 2 U. S. C. § 438(d)(1)-

(5). The "cross light" shed by the FECAA leads to the same conclusion, mandated by *Amtrak*, that Congress provided a specific remedy, but deliberately withheld the private cause of action which was "implied" from the statute by the majority below.

But, as *Amtrak* makes plain, "even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent." 414 U. S. at 458. Not only is it conceded here that the legislative history of § 610 is devoid of any indication of Congressional intent to create a private cause of action under § 610, the legislative history of the recent amendments makes plain the Congressional intent in enacting the FECA to withhold any private cause of action for alleged violations of § 610. The legislative history spells out with unmistakable precision the substantial considerations which led Congress to that deliberate choice. Those reasons are articulated by the Chairman of the House Conferees, Mr. Hays, when in the presentation of the Conference Report to the House, he said:

"MR. HAYS.

* * *

Three important aspects of the legislation should be underlined. First, the House conferees successfully insisted that the Federal Election Commission created by the act have "primary jurisdiction with respect to the civil enforcement" of the act's provisions. *The current provisions of the United States Code regulating Federal elections, with one minor exception, state that violations shall be punished through the criminal law.* The bill before the House while retaining and strengthening these criminal sanctions provides also for a comprehensive system of civil enforcement. *In order to assure that civil suits are not misused in a partisan manner, and that the complex and sensitive rights and duties stated in the act are administered expertly and uniformly, the act provides that all civil complaints predicated upon or pertaining in any manner to titles I and III of the act or sections 608 through 617 of title 18 United States Code shall be channeled to the Commission.* Under section 315 persons challenging the constitutionality of any provision of the act, retain their right to do so in court without exhausting administrative remedies to the extent the courts have jurisdiction under established principles. *The delicately balanced scheme of procedures and remedies set out in the act is intended to be the exclusive means for vindicating the rights and declaring the duties stated therein.* It should also be noted that while judicial review is provided by section 314(a) when the Commission "grants" certain orders, a determination that there is no probable cause to believe that a violation charged has occurred, whether made by the Commission or the Attorney General, is not reviewable."[17]

It is submitted that application of the principles of statutory construction elaborated in *Amtrak* and the presence of a clear expression of legislative intent compel the conclusion that the majority below erred in finding an implied private cause of action under § 610.

C. The Majority Below Relied on Decisions Which Are Plainly Distinguishable.

The majority below in "implying" a private right of action under § 610, placed principal reliance on *Bivens v. Six Unknown Named Agents*, 403 U. S. 388 (1971); *Wyan-*

17. 120 Cong. Rec. (daily ed. October 10, 1974), H10330.

dotte Transportation Co. v. United States, 389 U. S. 191 (1967); and *J. I. Case Co. v. Borak,* 377 U. S. 426 (1964). Quite apart from the fact, demonstrated above, that the principles of the *Amtrak* case and the recently enacted FECAA and its legislative history make these cases inapposite, the cases themselves do not support the implication of a private remedy in the specific circumstances of this case.

In *Bivens,* the Court divided over the issue whether there may be an implied cause of action for monetary damages against a federal officer acting under color of his authority for searches and seizures in violation of a citizen's Fourth Amendment rights, an issue which had been reserved in *Bell v. Hood,* 327 U. S. 678 (1946). As the opinion of the Court was at pains to point out, *Bivens,* unlike this case, was not simply a controversy among private citizens, but involved the relationship between a citizen and the federal government. The Court said:[18]

> "Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. *An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.* Cf. Amos v. United States, 255 U. S. 313; United States v. Classic, 313 U. S. 299."

In dramatic contrast to the case at bar, in *Bivens,* fundamental personal interests of *constitutional* dimen-

18. 403 U. S. 391-392.

sion[19] were arrayed on the side of implication of a private right of action, because the remedy was urged for the further protection of Fourth Amendment rights against unchecked governmental power.

The same cannot be said of the case at bar. As the prior opinions of this Court in *United States v. C. I. O., supra,* and *United States v. International Union United Auto Workers, supra,* show, the mere *existence* of a *criminal* prohibition of expenditures for speech raises the most serious, fundamental questions of constitutionality under the First Amendment. When the matter is removed a step further, and the question is posed whether a private right of action may be "implied" from such a criminal statute, it becomes clear that in such a case, unlike *Bivens,* constitutional considerations are plainly arrayed *against* further expansion of the scope of the statute to subsume remedies not even provided by Congress.

Even under the unusually compelling circumstances of *Bivens,* the doctrine of separation of powers counsels strongly against implication of private remedies not enacted by Congress. *Bivens v. Six Unknown Named Agents,* 403 U. S. 388, 411-412 (dissenting opinion of Mr. Chief Justice Burger).

J. I. Case Co. v. Borak, supra, holding that private actions would lie to redress violations of §14(a) of the Securities Exchange Act of 1934, 48 Stat. 902-903, 15 U. S. C. §78n(a), likewise does not support implication of a private remedy in this case. In *Case,* reliance was placed upon the general jurisdictional provision contained in §27

19. Emphasizing the point, the Court distinguished *Wheeldin v. Wheeler,* 373 U. S. 647 (1963), on this very ground: "Nor are we asked in this case to impose liability upon a congressional employee *for actions contrary to no constitutional prohibition, but merely said to be in excess of the authority delegated to him by the Congress.* Wheeldin v. Wheeler, 373 U. S. 647." 403 U. S. at 396-397.

of the SEC Act, 15 U. S. C. § 78aa.[20] As the Court of Appeals for the District of Columbia Circuit noted in distinguishing *Case* in *Holloway v. Bristol-Myers Corporation,* 485 F. 2d 986, 1001 (D. C. Cir. 1973), "[t]he presence of this provision reduced the degree of 'judicial implication' brought to bear in developing a private remedy, since it provided a firm basis from which to begin the process of extrapolation."[21]

No analogous general jurisdictional grant provides a basis for the implication of a private remedy from § 610. In contrast with § 27, relied on in *Case,* the relevant jurisdictional provisions of the FECA and the FECAA are narrow and specific, expressly relating only to enforcement proceedings brought by the *Attorney General.* See 2 U. S. C. § 438(d)(1)-(5) and § 314(a)(7) of the FECAA.

The majority below likewise adopted an overly broad reading of the holding in *Wyandotte Transportation Co. v.*

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20. Section 27 of the Act provides, in part:

> *"The district courts of the United States,* the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States *shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder.* Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. *Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or to enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business,* and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found."

21. It is not without significance that the SEC intervened in *Case* as *amicus curiae,* bringing to the Court's attention its limited resources and urging the recognition of private remedies as an adjunct, to its own enforcement powers. Brief of Securities & Exchange Commission as Amicus Curiae, *J. I. Case Co. v. Borak, supra.*

United States, supra, where it was held that the United States may recover from those responsible the cost of removing a private vessel negligently sunk in navigable waterways. There, the Court relied, in part, on the well-settled rule—inapplicable here—that the United States may sue to protect its interests. *Cotten v. United States,* 11 How. 229 (1851); *United States v. San Jacinto Tin Co.,* 125 U. S. 273 (1888); *Sanitary District v. United States,* 266 U. S. 405 (1925). Indeed, in *Sanitary District v. United States, supra,* a case which likewise involved the sovereign power of the United States to control the navigable waterways within its jurisdiction, Mr. Justice Holmes had stated that "[t]he Attorney General, by virtue of his office, may bring this proceeding, and no statute is necessary to authorize the suit. *United States v. San Jacinto Tin Co.,* 125 U. S. 273." 266 U. S. at 426. A further distinguishing feature in *Wyandotte* was emphasized by the Court. The Court there noted that the effect of adopting the view that, under the Rivers and Harbors Act of 1899, the United States could not recover the cost of removal of negligently sunken vessels would be to create an additional limitation of liability, inconsistent with the limitations theretofore expressly provided in the Limitation of Shipowners' Liability Act of 1851, 9 Stat. 935, as amended 46 U. S. C. § 181 et seq. Congress, however, had given no indication, in enacting the Rivers and Harbor Act, that it intended to alter or qualify the 1851 Act, and the Court relied on the congressional failure to connect the two statutes as further evidence that the inference of a limitation of liability to the salvage value of the sunken vessel was unwarranted. *Wyandotte Transportation Co. v. United States, supra,* 389 U. S. at 205-206.

No such general right to sue, analogous to that of the United States relied upon in *Wyandotte,* provides a basis for implication of a private cause of action from

§ 610 in favor of the *private* suitor in this case. Moreover, analysis of the legislative schema involved in this case, the FECA, rather than supporting the implication of a private remedy, compels the conclusion that Congress chose *not* to provide a private cause of action, a conclusion which is reinforced by the legislative history of the FECAA.

The majority opinion below is predicated on an unrestricted application of these cases, which do not, in fact, broadly grant the federal judiciary a roving commission to legislate causes of action where Congress has not done so. As Judge Aldisert noted in his dissent below, 496 F. 2d at 429, the broad reading of these cases results in a significant expansion of federal jurisdiction which is not authorized by Congress, the branch of government to which is committed the power to create subject matter jurisdiction for the federal courts:

> "I am persuaded that the Amtrak court could not fail to notice the plethora of implied civil remedy cases which arose from an unrestricted application of J. I. Case Co. v. Borak, *supra*, and an overgenerous use of Justice Black's overgenerous quotation in Bell v. Hood, 327 U. S. 678, 684 (1946), that 'federal courts may use any available remedy to make good the wrong done.' I am convinced that the Amtrak court consciously and deliberately applied the brakes and meant exactly what it said when it declared that a 'private cause of action not otherwise authorized by the statute' may not be implied in the absence of clear 'evidence of legislative intent.' "

This insistence on the necessity of a clear indication of Congressional intent is appropriate as an incident of the doctrine of separation of powers and is mandated by decisions of this Court. In *Wheeldin v. Wheeler*, 373 U. S. 647, 651 (1963), for example, decided one year before *J. I. Case Co. v. Borak, supra,* the Court said "[a]s respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating *Erie R. Co. v. Tompkins,* 304 U. S. 64. The instances where we have created federal common law are few and restricted." In that case, the Court refused to imply a private cause of action for abuse of the subpoena power by a federal officer. The Court went on to emphasize that "Congress has not done what was done in Textile Workers Union v. Lincoln Mills, 353 U. S. 448, and left to federal courts the creation of a federal common law for abuse of process." 373 U. S. at 652.

In *Nashville Milk Co. v. Carnation Company,* 355 U. S. 373, 377 (1958), the Court rejected the claim of a private right of action under § 3 of the Robinson-Patman Act, 15 U. S. C. § 13a, and said ". . . § 3 contains only penal sanctions for violation of its provisions; *in the absence of a clear expression of congressional intent to the contrary, these sanctions should under familiar principles be considered exclusive,* rather than supplemented by civil sanctions of a distinct statute. See *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.,* 236 U. S. 165, 174-175."

These familiar principles are reaffirmed in the *Amtrak* case and are applicable here. In the absence of such an indication of Congressional intent, a private cause of action not authorized by Congress is properly denied.[22]

22. *See e.g., Fagundez v. Oakland Raiders Professional Football Club,* 498 F. 2d 1394 (Temp. Emer. Ct. of Appeals 1974), (no implied private right of action under Economic Stabilization Act of 1970); *Holloway v. Bristol-Myers Corporation,* 485 F. 2d 986 (D. C. Cir. 1973) (no implied right of action under § 5 of the Federal Trade Commission Act, 15 U. S. C. § 45); *Lopez v. Luginbill,* 483 F. 2d 486 (10th Cir. 1973) (no implied private right of action under Title I of the Elementary and Secondary Education Act of 1965, 20 U. S. C. § 241 et seq.); *Flores v. George Braun Packing Company,* 482 F. 2d 279 (5th Cir. 1973) (no implied private right of action under the Immigration and Nationality Act, 8 U. S. C. §§ 1101(a)(15)(a)(ii), 1182(a)(14) or 1324); *Western Bancshares, Inc. v.*

D. In View of the Doubtful Constitutionality of § 610, the Court Below Should Have Restricted the Scope of the Statute Rather Than Expanding the Coverage of the Statute to Subsume Additional Remedies Not Authorized by Congress.

Finding an "implied" private right of action under § 610, the majority below said (496 F. 2d at 424):

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22. (Cont'd.)

Board of Gov. of Fed. Res. Sys., 480 F. 2d 749 (10th Cir. 1973) (no implied administrative authority under the Bank Holding Company Act of 1956, 12 U. S. C. § 1841 et seq.); *Vicenti v. United States*, 470 F. 2d 845 (10th Cir. 1972), *cert. dismissed*, 414 U. S. 1057 (no implied private right of action for damages under 25 U. S. C. §§ 345, 346, pertaining to claims by persons of Indian blood or descent for allotments of land); *Chavez v. Freshpict Foods, Inc.*, 456 F. 2d 890 (10th Cir. 1972), *cert. denied*, 409 U. S. 112 (no implied private right of action under the Immigration and Nationality Act, 8 U. S. C. §§ 1101, 1182, 1324 and 1325 and the Farm Labor Registration Act, 7 U. S. C. §§ 2041-2053); *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 457 F. 2d 81 (2d Cir. 1972) (no implied private right of action under the Rivers and Harbors Appropriation Act of 1899 for discharge of refuse into navigable waters); *Jordan v. Montgomery Ward & Co.*, 442 F. 2d 78 (8th Cir. 1971), *cert. denied*, 404 U. S. 870 (no implied private right of action under credit advertising requirement); *B. F. Goodrich Company v. Northwest Industries, Inc.*, 424 F. 2d 1349 (3d Cir. 1970), *cert. denied*, 400 U. S. 822 (1970) (no implied private right of action under § 5 of the Interstate Commerce Act); *Royal Services, Inc. v. Maintenance, Inc.*, 361 F. 2d 86 (5th Cir. 1966) (no implied private right of action under the Small Business Act, 15 U. S. C. §§ 631-647); *Blaney v. Florida National Bank at Orlando*, 357 F. 2d 27 (5th Cir. 1966) (no implied private right of action under § 2 of the Federal Reserve Act, 12 U. S. C. § 501a, 12 U. S. C. 92a, 93); *27 Puerto Rican Migrant F. W. v. Shade Tobacco G. A. A., I.*, 352 F. Supp. 986 (D. Conn. 1973) *aff'd*, 486 F. 2d 1052 (2d Cir. 1973) (no implied private right of action under the Wagner Peyser Act of 1933, 29 U. S. C. § 49 et seq.); *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532 (S. D. Tex. 1972) (no implied private right of action under National Environmental Policy Act of 1969, 42 U. S. C. § 4321 et seq.); *Danna v. Air France*, 334 F. Supp. 52 (S. D. N. Y. 1971), *aff'd*, 463 F. 2d 407 (2d Cir. 1972) (no private right of action for discriminatory Youth Fares under the Federal Aviation Act of 1958, 49 U. S. C. §§ 1301-1542).

"We note no countervailing reason for denying private remedies here. The matter before us involves none of the 'special circumstances' discussed in *Borak* as counseling denial of a private cause of action. See *J. I. Case Co. v. Borak, supra,* at 396-97 [sic]. Nor does § 610 involve the operation of a regulatory agency whose policy determinations on this or other matters might be threatened by allowing private enforcement. See *Holloway v. Bristol-Meyers Corp., supra* at 990-92, 997-1002. Thus, we find allowance of a private cause of action, whether brought by a citizen to secure injunctive relief or by a stockholder to secure injunctive or derivative damage relief, proper to remedy violation of § 610."

With deference, countervailing reasons as significant as any which are likely to be presented to the Court rule out judicial legislation of a private cause of action under § 610.

It is a cardinal principle of statutory construction that where the language of an act will bear two interpretations equally obvious, that one which avoids conflict with the provisions of the Constitution is to be preferred. *United States v. Vuitch*, 402 U. S. 62, 70 (1971); *United States v. National Dairy Products Corp.*, 372 U. S. 29, 32 (1963); *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 341 (1936) (concurring opinion of Mr. Justice Brandeis); *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 408 (1909); *Knights Templars' & Masons' Life Indemnity Co. v. Jarman*, 187 U. S. 197 (1902). Whenever possible statutes are to be construed in a manner that not only upholds their constitutionality but also steers clear of constitutional uncertainty. *Lynch v. Overholser*, 369 U. S. 705, 710-711 (1962); *Flemming v. Nestor*, 363 U. S. 603, 617 (1960); *United States v. Harriss*, 347 U. S. 612, 618 n. 6 (1954).

That interpretation of legislation "which gives it the greater chance of surviving the test of constitutionality" is favored. *Ex parte Endo,* 323 U. S. 283, 299 (1944); cf. *United States v. Rumely,* 345 U. S. 41, 46 (1953). Perhaps the leading case on this point, *United States v. C. I. O., supra,* involved § 610, itself.

The majority below has "implied" from § 610 a private cause of action, not provided by Congress, in spite of the most serious doubt concerning the constitutionality of the statute. Its decision affords every registered voter in the country an unrestricted private remedy for injunctive relief to halt expenditures by any union or corporation for speech or publication of ideas whenever the expression involved is subjectively imagined to fall within the wide dragnet of § 610. It creates a potent weapon which one citizen or group in the community may now deploy to stifle or silence, *in advance,* expression of others on issues of the day.

Prior to the decision below, discretion to prosecute under § 610 was committed by Congress to the judgment of responsible public officials. Even thus confined in its use, the mere *existence* of this overbroad criminal provision has a chilling effect on the exercise of constitutionally protected rights under the First Amendment.

On a dubious rationale, the majority decision below *expands* the coverage of the statute to subsume new remedies not provided by Congress, creating a private remedy subject to the greatest potential for partisan abuse,[23] inviting frivolous suits by every imaginative voter, stockholder or union member with a desire for publicity at election-time. The implication of a private remedy under § 610

23. The recently enacted Federal Election Campaign Act Amendments of 1974, P. L. 93-443, and its legislative history, discussed *supra* at pp. 27-33, demonstrate that the potentiality of abuse of private suits was a prime reason why Congress deliberately withheld a private remedy. See 120 Cong. Rec. (daily ed. October 10, 1974), H10330.

will have an immediate and direct effect, encroaching not only the right of expression but on the right of the public to hear the presentation of all views on important issues as well—a result plainly contrary to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York Times v. Sullivan,* 376 U. S. 254, 270-271 (1964); cf. *Branzburg v. Hayes,* 408 U. S. 665, 711-752 (dissenting opinions of Mr. Justice Douglas and Mr. Justice Stewart).

The same constitutional considerations which have led the Court to limit carefully even well-recognized common-law causes of action, such as libel and defamation, here provide compelling reasons against judicial creation of a private right of action under § 610, which Congress itself did not see fit to provide. As the Court has repeatedly emphasized, the freedoms of speech and of press must be afforded "adequate 'breathing space'" if they are to survive. *Rosenbloom v. Metromedia,* 403 U. S. 29, 50 (1971); *Time, Inc. v. Hill,* 385 U. S. 374, 388-389 (1967); *New York Times Co. v. Sullivan,* 376 U. S. 254, 271-272 (1964). The existence of the remedy "implied" by the majority below from a statute as overbroad as § 610, will, in view of the great potentiality for abuse, inevitably result in self-censorship and will thus create a danger that protected expression will be deterred. *Rosenbloom v. Metromedia, supra,* 403 U. S. at 50; *Speiser v. Randall,* 357 U. S. 513, 526 (1958).[24]

24. The majority stressed, in its assessment of the propriety of a private cause of action the potential efficacy of swift injunctive relief in private actions under § 610, 496 F. 2d at 423-424 [A103-104], but this rationale is constitutionally impermissible. Injunctive relief against publication or expression of views on vital issues would surely be barred by the doctrine of prior restraint. *New York Times Co. v. United States,* 403 U. S. 713 (1971); *Organization for a Better Austin v. Keefe,* 402 U. S. 415 (1971); *Near v. Minnesota,* 283 U. S. 697 (1931).

Finally, the implication of a private cause of action *only* with respect to corporations and labor unions, *not applicable to* voluntary associations, partnerships and unincorporated business entities, is a denial of equal protection of the laws. *Police Department of the City of Chicago v. Mosley*, 408 U. S. 92 (1962); *United States v. C. I. O., supra*, 335 U. S. at 154-155; *Grosjean v. American Press Co., Inc.*, 297 U. S. 233 (1936).

In view of these countervailing reasons, the Court of Appeals should have given effect to the rule of statutory construction requiring avoidance of constitutional questions and, instead of construing the statute to expand its coverage to subsume additional remedies not authorized by Congress, should have *restricted* the scope of § 610 to its express criminal sanction.

Application of settled principles of statutory construction here dictates that no private cause of action should be "implied" from § 610. There is no manifestation of Congressional intent in the language of the Act to create such a private cause of action. There is no legislative history evidencing congressional intent to imply authorization for such a private right of action. There is no jurisdictional provision, such as that relied upon in *J. I. Case Co. v. Borak, supra*, conferring federal jurisdiction over the subject matter and supplying a basis for implication. There are substantial constitutional considerations which rule out implication of a private cause of action. On the other hand, there is a plain inference of Congressional intent not to create a private remedy, to be drawn from the conspicuous absence from the title in question of any private remedy as contrasted with the express provision of a private remedy in another title of the same Act, and there is a clear, reasoned expression of Congressional intent deliberately to withhold the remedy.

For all of these reasons, the decision of the Court of Appeals "implying" such a remedy should be reversed.

II. The Majority Departed From Sound Principles of Statutory Construction in Adopting a Sweeping Construction of the Term "Expenditure" as Used in § 610.

Section 610 declares that "[i]t is unlawful . . . for any corporation whatever, or any labor organization to make a contribution or expenditure *in connection with*" any federal election. Section 205 of the FECA amended § 610 by adding the following language:

> "As used in this section, the phrase 'contribution or expenditure' shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; but shall not include communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject; nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families; the establishment, adminstration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization: *Provided,* That it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of

value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction."

Section 201 of the FECA amended 18 U. S. C. § 591 to provide the following definition of the term "expenditure" as used in § 610:

"§ 519. *Definitions.*

"When used in sections 597, 599, 602, 608, 610, and 611 of this title—

"(f) 'expenditure' means—

"(1) a *purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value* (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business), *made for the purpose of influencing the nomination for election, or election, of any person to Federal office,* for the purpose of influencing the result of a primary held for the selection of delegates to a national nominating covention of a political party or for the expression of a preference for the nomination of persons for election to the office of President, or for the purpose of influencing the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States;

"(2) a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make any expenditure; and

"(3) a transfer of funds between political committees;

Section 610 thus imposes a complete prohibition against contributions and expenditures "in connection with" federal elections, which is applicable only to labor unions and corporations.

The Court below held that the term "expenditure" as defined in § 591 and employed in § 610, may include within its indiscriminate sweep an expenditure by a corporation or labor union for advertising or other publication of expression which does not mention the name of any political party or of any candidate for election to federal office. The construction thus adopted conflicts with a series of decisions in other circuits (based on language in *United States v. International Union United Auto Workers, supra*), holding that an expenditure by a labor union or corporation for advertising falls within the scope of § 610's prohibition only if the advertising is in the nature of "active electioneering." *United States v. Lewis Food Co.,* 366 F. 2d 710 (9th Cir. 1966), *reversing,* 236 F. Supp. 849 (C. D. S. D. Cal. 1964), *on remand from* 381 U. S. 908 (1965); *United States v. Anchorage Central Labor Council,* 193 F. Supp. 504, 507 (D. Alaska 1961); *cf. United States v. National Committee for Impeachment,* 469 F. 2d 1135 (2d Cir. 1972).

The Court below reached its conclusion on the question of statutory construction without reference to this uniform construction of the "expenditure" prohibition of § 610, and, unlike every other court which has faced this question of statutory construction under § 610, did so without addressing itself to the serious constitutional questions posed by such a construction. See *United States v. International Union United Auto Workers,* 352 U. S. 567 (1957); *United States v. Lewis Food Company, Inc.,* 366 F. 2d 710 (9th

Cir. 1966); *United States v. Painters Local Union No. 481*, 172 F. 2d 854 (2d Cir. 1949); *Ash v. Cort*, 350 F. Supp. 227 (E. D. Pa. 1972); *United States v. Lewis Food Company, Inc.*, 236 F. Supp. 849 (S. D. Cal. 1964); *United States v. Anchorage Central Labor Council*, 193 F. Supp. 504 (D. Alaska 1961); *United States v. International Union United Automobile Workers*, 138 F. Supp. 53 (E. D. Mich. 1956); *United States v. Construction & General Laborers Local Union*, 101 F. Supp. 869 (W. D. Mo. 1951); *United States v. Painters Local Union No. 481*, 79 F. Supp. 516 (D. Conn. 1948); *United States v. C. I. O.*, 77 F. Supp. 355 (D. D. C. 1948); cf. *United States v. National Committee for Impeachment*, 469 F. 2d 1135 (2d Cir. 1972).

The checkered history of the "expenditure" provision of § 610 is well known. *United States v. C. I. O.*, 335 U. S. 106 (1948), presented the question whether an expenditure for an editorial which appeared in the July 14, 1947, issue of a labor union newspaper entitled "The C. I. O. News," specifically urging the election of a candidate for Congress, was an illegal "expenditure" within the meaning of § 610.[25]

Applying the rule of statutory construction requiring that statutes be construed, where possible, to avoid constitutional doubt, five members of the Court affirmed dismissal of the indictment on the basis of a narrowing construction of § 610, under which the indictment failed to state an offense. The Court said (335 U. S. at 121):

25. According to the indictment, the editorial stated, in part: "* * * I take the opportunity to urge that all members of CIO residing and voting in the Congressional District in which this election is scheduled to take place cast their votes for Judge Garmatz, and make every effort to bring their neighbors and friends and to all persons eligible to vote in this election a full understanding of the issues involved and of the importance of voting for Judge Garmatz." Transcript of Record at 5, *United States v. C. I. O.*, 335 U. S. 106 (1948).

> "If § 313 were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interests from the adoption of measures or the election to office of men, espousing such measures, the gravest doubt would arise in our minds as to its constitutionality."

Four members of the Court concurred in the result, but on the ground that the "expenditure" provision of § 610 is unconstitutional. In a penetrating concurring opinion for the minority, Mr. Justice Rutledge, joined by Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Murphy, analyzed the constitutional deficiencies of this provision and concluded (335 U. S. at 155):

> "A statute which, in the claimed interest of free and honest elections, curtails the very freedoms that make possible exercise of the franchise by an informed and thinking electorate, and does this by indiscriminate blanketing of every expenditure made in connection with an election, serving as a prior restraint upon expression not in fact forbidden as well as upon what is, cannot be squared with the First Amendment."

Although that case dealt with expenditures by a labor union, similar constitutional problems were raised in connection with its application to corporations. 335 U. S. at 153-155.

The "expenditure" provision of § 610 was again before the Court in the context of labor union expenditures for political advertising in *United States v. International Union United Auto Workers*, 352 U. S. 567 (1957). The indictment in that case charged the union with having made expendi-

tures from its general union treasury to defray the costs of television broadcasts, sponsored by the union over a commercial television station, which "*urged and endorsed selection of certain candidates* for representatives and senator to the Congress of the United States and included expressions of political advocacy intended by defendant to influence the electorate and to affect the results of the election." 352 U. S. at 584. The District Court dismissed the indictment, on the ground that it failed to state an offense under § 610. *United States v. International Union United Auto Workers,* 138 F. Supp. 58 (E. D. Mich. 1956).

On a direct appeal, this Court reversed. The majority held that the "expenditure" provision of § 610 prohibits an expenditure by a labor union for advertising addressed to the public at large which endorses or advocates the election of *particular* candidates for federal office or urges that the electorate vote at a federal election for a *particular* political party. The majority emphasized the narrowness of the holding (352 U. S. at 589):

> "The evil at which Congress has struck in § 313 [now § 610] is the use of corporation or union funds to influence the public at large to vote *for a particular candidate or a particular party.*"

Clear legislative history on the precise issue presented in that case precluded application of the rule of construction commanding selection of that interpretation which avoids the question of constitutionality. Adjudication of the constitutional issues was postponed, but, in framing the factual context deemed necessary for the resolution of the constitutional questions, the majority posed these questions (352 U. S. at 592):

> ". . . [W]as the broadcast paid for out of the general dues of the union membership or may the funds be fairly said to have been obtained on a voluntary basis? Did the broadcast reach the public at large or only those affiliated with appellee? *Did it constitute active electioneering or simply state the record of particular candidates on economic issues?* Did the union sponsor the broadcast with the intent to affect the results of the election?

The term "active electioneering" was used in this context to refer to an advertisement addressed to the public at large which endorses the election of specific, *named* candidates for federal office or which urges the public at large to vote for a specific, *named* political party.[26]

The dissenting opinion in *United States v. International Union United Auto Workers, supra,* forcefully reiterated the position of the minority in *C. I. O.* and further demonstrated that the "expenditure" provision, applied to expenditures by a union to advocate election of particular persons or to urge the public at large to vote for a particular party, runs directly counter to the absolute command of the First Amendment and subverts the most fundamental value which that Amendment was designed to protect. Following the rule of statutory construction, the dissent argued for the adoption of a narrowing construction of the "expenditure" provision which would avoid the constitutional question:

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26. The term "active electioneering" appears to have originated in the Government's Brief in *United States v. International Union United Auto Workers, supra.* At page 51 of that Brief, the Government contended: "It is only when the union undertakes active electioneering, on behalf of particular federal candidates and designed to reach the public at large . . ." that the "expenditure" prohibition of § 610 is violated. This passage from the Government's Brief gains added significance from the fact that it is quoted verbatim in the legislative history of the FECA by the sponsor of the amendment. 117 Cong. Rec. 43379 (remarks of Mr. Hansen).

"These constitutional questions are so grave that the least we should do is to construe the Act, as we have in comparable situations, United States v. C. I. O., supra; United States v. Rumely, 345 U. S. 41; United States v. Harriss, 347 U. S. 612, *to limit the word 'expenditure' to activity that does not involve First Amendment rights.*

"*The Act, as construed and applied, is a broadside assault on the freedom of political expression guaranteed by the First Amendment.* It cannot possibly be saved by any of the facts conjured up by the Court. The answers to the questions reserved are quite irrelevant to the constitutional questions tendered under the First Amendment."

On remand in *United States v. International Union United Auto Workers,* the defendants were acquitted.

On the basis of the language in the majority opinion in that case suggesting the constitutional relevance of the concept of "active electioneering," the lower courts have developed, in a line of decisions without exception until the decision in this case, a test for determining the legality of expenditures for advertising under § 610, with the aim of avoiding serious constitutional problems. Under these cases construing the "expenditure" provision of § 610, only expenditures for advertising in the nature of "active electioneering" are deemed illegal under § 610.

Thus, applying the "active electioneering" test, in *United States v. Lewis Food Company,* 236 F. Supp. 849 (S. D. Cal. 1964), the District Court dismissed an indictment under § 610 which charged that the defendant corporation had made expenditures totalling $9,523.68 to publish an advertisement entitled "Important Notice to Voters" in at least fourteen newspapers. The advertisement in question listed by name 2 United States Senators, 30 members of the House of Representatives, 40 California State Senators, and 80 California State Assemblymen, stating each legislator's political party affiliation. Opposite each legislator's name appeared a "rating" expressed as a percentage, which the text of the advertisement explained showed "the percentage of his votes cast in favor of constitutional principles." The advertisement stated that "100% is perfect." Twenty-eight legislators identified as Democrats received scores of 0. No legislator identified as a Republican received a score of 0.

This Court remanded the Government's appeal of the dismissal to the Court of Appeals for the Ninth Circuit, 381 U. S. 908 (1965). Although reversal followed, in the Court of Appeals, *United States v. Lewis Food Company,* 366 F. 2d 710 (9th Cir. 1966), the Government conceded, and the Court of Appeals held, that an expenditure for advertising does not fall within the purview of § 610 unless the advertisement is in the nature of "active electioneering." 366 F. 2d at 712.

The "active electioneering" test was also applied in *United States v. Anchorage Central Labor Council,* 193 F. Supp. 504 (D. Alaska 1961), where it was held that no offence was stated under § 610 by an indictment charging that the defendants made expenditures for four fifteen-minute television broadcasts, intended to reach the general public, which "criticized the fitness of three of the candidates for Senator and Representative upon their 'record'." *Cf. also, United States v. National Committee for Impeachment,* 469 F. 2d 1135 (2d Cir. 1972); *Schwartz v. Rommes,* 495 F. 2d 844 (2d Cir. 1974).

The Court below, without discussing the bearing of prior decisions of this Court on the question of statutory construction involved here, and without discussing the

"active electioneering" test subsequently developed in the lower courts, ruled broadly that expenditures for advertising may violate § 610 even though the advertising expresses opinions on public issues and does not mention the name of any political party or of any candidate for election to federal office. Far from being "active electioneering" the Advertisement urges voters to:

> ". . . look at every candidate's declared political programs. Analyze every issue. If you think any of them are faulty, ill-founded, or misleading, prepare your own answers and use those answers to set the record straight.
>
> • • •
>
> "Plan to attend political functions and stand up when spokesmen are off base. Concerned citizens ought to do this; it's nothing more than true democracy in action."

If § 610 may truly be construed, as the Court below has done, to outlaw an expenditure for such an expression or to outlaw the incidental reply therein by a corporation to an accusation by an *unidentified* "candidate", and if that construction is allowed to stand, the expression of abstract ideas and of opinion finally will have been caught within the sweep of governmental power and made criminal. The most basic and fundamental principle will then have been discarded:

> "Under our Constitution it is We The People who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation. *It is therefore important—vitally important—that all channels of communication be open to them during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community.*" 352 U. S. at 593.

The result reached by the majority below can be reached only by ignoring the repeated admonition of this Court that of two equally obvious constructions of a statute, that which is plainly in accord with the Constitution is the construction to be adopted. *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 408 (1909); *Knights Templars' & Masons' Life Indemnity Co. v. Jarman*, 187 U. S. 197 (1902), and that statutes are to be construed in a manner that not only upholds their constitutionality but also steers clear of constitutional uncertainty. *Lynch v. Overholser*, 369 U. S. 705, 710-711 (1962); *Flemming v. Nestor*, 363 U. S. 603, 617 (1960); *United States v. Harriss*, 347 U. S. 612, 618 n. 6 (1964); *United States v. Jin Fuey Moy*, 241 U. S. 394 (1916).

It is difficult to imagine a context where this principle operates with greater force than where a criminal statute might otherwise encroach on First Amendment rights. See *United States v. Robel*, 389 U. S. 258, 262 (1967); *United States v. Rumely*, 345 U. S. 41, 45-47 (1953); *Schwartz v. Romnes*, 495 F. 2d 844, 852 (2d Cir. 1974); *United States v. National Committee for Impeachment*, 469 F. 2d 1135, 1140-1141 (2d Cir. 1972).

In *United States v. C. I. O., supra*, Mr. Justice Reed said of § 610, itself (335 U. S. at 120-121):

> ". . . [I]t is clear that Congress was keenly aware of the constitutional limitations on legislation and of the danger of the invalidation by the courts of any enactment that threatened abridgment of the freedoms of the First Amendment. It did not want to pass any legislation that would threaten interferences with the

> privileges of speech or press or that would undertake to supersede the Constitution. *The obligation rests also upon this Court in construing congressional enactments to take care to interpret them so as to avoid a danger of unconstitutionality.*"

This case presents a question of statutory construction left open by the majority opinions in *United States v. C. I. O., supra,* and *United States v. International Union Auto Workers, supra.* In both of the previous cases, the Court was confronted with expenditures for "active electioneering," advertising endorsing a particular named candidate for election to federal office or an urging that the electorate [27] vote for a *particular named political party.* In this case, that element present in the two earlier cases is missing. Neither the Advertisement nor the Speech nor the Folder mentions the name of any political party or of any candidate for election to any federal office.

In Title II of the FECA, Congress amended certain of the criminal code provisions, relating to elections. Section 591 was amended to define the term "expenditure" as used in § 610. A similar definition of "expenditure" is found in Title III of the FECA in key provisions triggering reporting and disclosure requirements. See *United States v. National Committee for Impeachment, supra.*

Section 591 provides, in relevant part, that for an expenditure to fall within the scope of § 610's prohibition, it must be "*made for the purpose of influencing the nomination for election, or election, of any person to Federal office . . . .*" 18 U. S. C. § 591(f)(1). The subtle imprecision of the statutory language in § 591(f)(1) leaves the reach of the statute unclear in the precise situation pre-

27. In *C. I. O.,* of course, the challenged expression was not directed to the general public, but only to members of the union via the *C. I. O. News.*

sented in this case, where neither the Advertisement nor the Speech nor the Folder so much as mentions "any person" but do incidentally express opinions upon abstract issues. Although the drafting of § 591(f)(1) is problematical in other respects, the word chiefly responsible for its imprecision is the term "*influencing.*" The constitutional problem created by Congress' use of the word "influencing," and its other forms in legislation touching the exercise of First Amendment rights is not a new one for the Court. See e.g. *United States v. Harriss,* 347 U. S. 612 (1954); *United States v. Rumely,* 345 U. S. 41 (1953). Adopting a narrowing construction in *Rumely,* the Court construed a House Resolution authorizing investigation of " 'all lobbying activities intended to *influence,* encourage, promote, or retard legislation' " to cover only " 'lobbying in its commonly accepted sense,' that is, 'representations made directly to the Congress, its members, or its committees.' " In *Harriss,* the Court cured a similar problem with the use of the term "influence" in § 307(b) of the Federal Regulation of Lobbying Act, which contained the phrase "[t]o *influence,* directly or indirectly, the passage or defeat of any legislation by the Congress of the United States."

It is submitted that in selecting the construction of "expenditure," as defined in § 591(f)(1), in § 610, which makes criminal an expenditure for advertising, not in the nature of "active electioneering," which does not mention the name of any political party or the name of any candidate for election to office, the majority below violated the settled principle which dictates that of two equally obvious alternative constructions of a statute, that which clearly comports with the provisions of the Constitution is the construction to be adopted.

On this question of statutory construction, in an area of the law where criminal sanctions are brought within

the very closest proximity to Constitutionally protected expression, the Court below should have followed the construction adopted by the Court of Appeals of the Second Circuit in *United States v. National Committee for Impeachment, supra.* In that case, the Government sought injunctive relief against the defendants who had placed a two-page advertisement in the "New York Times" entitled "A Resolution To Impeach Richard M. Nixon as President of the United States." The advertisement printed the names of Congressmen who had endorsed the proposed resolution as an "Honor Roll", and in the following language solicited funds to be used for political purposes:

> "The National Committee For Impeachment will devote its resources in funds and publicity in aid of any new candidate for election to the House of Representatives or re-election of an incumbent Member, whether in a primary contest or the actual election contest, whether Republican, Democrat, Independent, or a new party, in the order in which their names are officially printed in the Congressional Record. * * *"

The Court of Appeals for the Second Circuit rejected the Government's contention that the expenditure for the advertisement qualified as an "expenditure" under § 301 of the FECA and made the advertisers a "political committee" within the meaning of § 301, thus subjecting them to the reporting requirements of Title III of the Act. It was held that the definition of "expenditure" in Section 301 of the FECA, which closely parallels the definition of that term in Section 201 of the Act, 18 U. S. C. § 591(f)(1), and used in 18 U. S. C. § 610, does not encompass expenditures for advertising which derogates the stand taken by a particular candidate on any question.

The Court of Appeals for the Second Circuit outlined what it saw as the "abhorrent" consequences of the contrary view, adopted by the Court below:

> "We dispose more readily of the Government's suggestion that the Act applies to the National Committee because—quoting from the affidavit supporting its motion for a preliminary injunction—'With respect to the upcoming election for President and Vice-President of the United States, the National Committee derogates President Nixon's stand on a principal campaign issue—the Vietnam war.' On this basis every position on any issue, major or minor, taken by anyone would be a campaign issue and any comment upon it in, say, a newspaper editorial or an advertisement would be subject to proscription unless the registration and disclosure regulations of the Act in question were complied with. Such a result would, we think, be abhorrent; the Government fails to point to a shred of evidence in the legislative history of the Act that would tend to indicate Congress meant to go so far. Any organization would be wary of expressing any viewpoint lest under the Act it be required to register, file reports, disclose its contributions, or the like. On the Government's thesis every little Audubon Society chapter would be a 'political committee,' for 'environment' is an issue in one campaign after another. On this basis, too, a Boy Scout troop advertising for membership to combat 'juvenile delinquency' or a Golden Age Club promoting 'senior citizen rights' would fall under the Act. The dampening effect on first amendment rights and the potential for arbitrary administrative action that would result from such a situation would be intolerable." 469 F. 2d at 1142 (footnote omitted).

To adopt a construction here similar to that adopted in *United States v. National Committee for Impeachment, supra,* would be "in the candid service of avoiding a serious constitutional doubt," *United States v. Rumely,* 345 U. S. 41, 47 (1953), and the construction commends itself for application here. There is no indication in the legislative history that Congress intended the statute to apply to expenditures for advertising which expresses views on public issues and which does not even mention the name of any political party or the name of any candidate for election to federal office.[28] Construction of the statute in this fashion, moreover, would not seriously impair the effectiveness of the FECA in coping with the problem of expenditures for "active electioneering," the endorsement of named political parties or named candidates for election to federal office. It would, moreover, be in accordance with the cardinal rule that, where possible, the Court has the duty to adopt that construction which avoids serious constitutional doubt, and it would be based on well-established precedent. *United States v. Harriss, supra; United States v. Rumely, supra.*

But, the majority below in this case departed from that sound principle of statutory construction and selected the very construction which gives rise to grave questions concerning the constitutionality of the "expenditure" provision of § 610. The decision below has given such a sweeping connotation to the term "expenditure" in § 610 that the demarcation between criminal speech and legal speech is now impossibly beclouded, thereby aggravating the existing constitutional infirmities of the "expenditure" provision of § 610.

28. The legislative history of the FECA, on the contrary, emphasizes that Congress' concern was with expenditures for advertising in the nature of "active electioneering on behalf of *particular* federal candidates." *See, e.g.* 117 Cong. Rec. 43379 (remarks of Mr. Hansen).

For these reasons, the Court below should have held as a matter of law that the advertising in question was not in the nature of "active electioneering" and that the expenditure therefor was not "made for the purpose of influencing the nomination for election, or election, of any person to Federal office." The construction of § 610 adopted below should be rejected and the judgment below should be reversed.

III. On Its Face and as Construed and Applied by the Court of Appeals, § 610 Is Violative of the Freedoms of Speech, Press, Petition and Association Guaranteed by the First Amendment.

That § 610's blanket prohibition of contributions and expenditures by labor unions and corporations raises grave constitutional questions has been acknowledged in the prior opinions in this Court in *United States v. C. I. O., supra,* and *United States v. International Union United Auto Workers, supra.* In those cases, the Court narrowly avoided invalidating this restrictive statute, and the constitutional deficiencies received definitive elaboration in the opinions in those cases. The constitutional questions were expressly pretermitted in *Pipefitters Local Union No. 562 v. United States,* 407 U. S. 385, 400 (1972). As noted in the foregoing arguments, these serious constitutional questions are among the compelling reasons why "implication" by the Court below of an unrestricted private cause of action from this penal statute was unsound and contrary to law.

Although the Court below did not discuss any of the constitutional difficulties inherent in the question of statutory construction, those difficulties plainly invoke the rule that where a statute is susceptible of two constructions, one raising serious constitutional questions, and the other avoiding them, the Court's duty is to adopt the latter con-

struction. The majority below ignored that duty.[29] By reason of its conclusions, that there is an implied right of action for alleged violations of § 610 and that § 610 includes within its indiscriminate sweep expenditures for advertising, not in the nature of active electioneering, which does not mention the name of any political party or of any candidate for election to federal office, it became the duty of the Court below to reach the issue whether the statute, as thus construed by it, comports with the First and Fifth Amendments. This responsibility the Court below declined to assume.

Two important sources of constitutional protection establish the right of corporations to participate in the democratic process and to make expenditures[30] to engage in public debate on important national issues.

29. In spite of the duty to avoid constitutional difficulties, the majority adopted the view that the constitutional questions were not properly before it. 496 F. 2d at 426 [A108]. This position finds no support in the record. It is inconsistent with the facts (1) that the constitutional issues were clearly raised as bases for the motion for summary judgment in the District Court [A81], (2) that the motion was granted, by an order which did not restrict the grounds [A87], and (3) that Ash plainly presented the constitutional issues for review by the Court of Appeals [A89-91].

30. It is unnecessary to dwell on the threshold question, whether, consistent with the First Amendment, Congress may cripple speech it cannot directly prohibit by outlawing the expenditure of money necessary to make the speech effective. That question was definitively answered in the negative by Mr. Justice Rutledge in *United States v. C. I. O., supra*, 335 U. S. at 146. What Mr. Justice Rutledge said of unions is equally true of corporations: "Unions can act and speak today only by spending money, as indeed is true of nearly every organization and even of individuals if their action is to be effective." And, as was pointed out in *United States v. International Union United Auto Workers*, 352 U. S. at 594 (dissenting opinion of Mr. Justice Douglas): "It usually costs money to communicate an idea to a large audience. But no one would seriously contend that the expenditure of money to print a newspaper deprives the publisher of freedom of press. Nor can the fact that it costs money to make a speech—whether it be hiring a hall or purchasing time on the air—make the speech any the less an exercise of First Amendment rights."

First, precedents in this Court establish that the protection of the First Amendment encompasses the rights of corporations to engage in dissemination of ideas and to contribute to the flow of information and opinion in the marketplace of ideas. The Court addressed itself to this very issue in *Grosjean v. American Press Co., Inc.*, 297 U. S. 233, 244 (1936), and so held.[31] Citing *Grosjean* in the *C. I. O.* case, Justice Rutledge pointed out (335 U. S. at 154, 155), in the context of examining the constitutional issues posed by § 610, that:

> ". . . [I]t does not follow the broadside and blanketing prohibitions here attempted in restriction of freedom of expression and assembly would be valid in their corporate applications. *Corporations have been held within the First Amendment's protection against restrictions upon the circulation of their media of expression.* Grosjean v. American Press Co., 297 U. S. 233, 56 S. Ct. 444, 80 L. Ed. 660. It cannot therefore be taken, merely upon legislative assumption, practice or judgment, that restrictions upon freedoms of expression by corporations are valid."

This general proposition has been reaffirmed in subsequent decisions of this Court. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U. S. 127 *rehearing denied*, 365 U. S. 875 (1961); *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495 (1952); *Kingsley International Picture Corp. v. Regents of the University of New York*, 360

31. Clear precedents establish the standing of Petitioners to raise the constitutional issues. *United States v. Robel*, 389 U. S. 258 (1967); *Keyishian v. Board of Regents*, 385 U. S. 589 (1967); *Dombrowski v. Pfister*, 380 U. S. 479, 491-492 (1965); *Kunz v. New York*, 340 U. S. 290 (1951); cf. *Coates v. City of Cincinnati*, 402 U. S. 611, 619-620 (1971) (dissenting opinion of Mr. Justice White); see *Walker v. City of Birmingham*, 388 U. S. 307, 344-345 (1967) (dissenting opinion of Mr. Justice Brennan).

U. S. 684 (1959); *Times Film Corporation v. Chicago,* 365 U. S. 43 (1961); *Pennekamp v. Florida,* 328 U. S. 331 (1946); *Bridges v. California,* 314 U. S. 252 (1941); See, *Schwartz v. Romnes,* 495 F. 2d 844 (2d Cir. 1974); King, *Corporate Political Spending and the First Amendment,* 23 U. PITT. L. REV. 847 (1962).

The principle is, moreover, consistent with the second source of constitutional protection. The language of the First Amendment is cast not in terms of protection of any delimited sources of expression, but in absolute terms as a restraint upon Congressional power in this field. The First Amendment "protects the freedom of those activities of thought and communication by which we 'govern'. It is concerned not with a private right, but with a public power, a governmental responsibility."[32] As the Court said in *Red Lion Broadcasting Co. v. F. C. C.,* 395 U. S. at 390, "[T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' *Garrison v. Louisiana,* 379 U. S. 64, 74-75 (1964). See Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment,* 79 HARV. L. REV. 1 (1965). It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. The right may not constitutionally be abridged either by Congress or by the F. C. C." What is involved here, then, is nothing less than the critically important process of public enlightenment which this

32. Meiklejohn, *The First Amendment Is an Absolute,* 1961 SUPREME COURT REVIEW 245, 255.

Court identified time and again as the core concern of the First Amendment. *Stromberg v. California,* 283 U. S. 359, 369 (1931); *DeJonge v. Oregon,* 299 U. S. 353, 365 (1937); *Terminiello v. Chicago,* 337 U. S. 1, 4 (1949); *Smith v. California,* 361 U. S. 147, 153 (1959); *New York Times Co. v. Sullivan,* 376 U. S. 254, 269 (1964); *Time, Inc. v. Hill,* 385 U. S. 374, 389 (1967); *Branzburg v. Hayes,* 408 U. S. 665, 725-727 (1972) (dissenting opinion of Mr. Justice Stewart).

This fundamental constitutional concept cannot be squared with § 610's absolute prohibition. As Mr. Justice Rutledge stated in *C. I. O.* (335 U. S. at 144):

> "There is . . . an effect in restricting expenditures for the publicizing of political views not inherently present in restricting other types of expenditure, namely, that it *necessarily deprives the electorate, the persons entitled to hear, as well as the author of the utterance whether an individual or a group of the advantage of free and full discussion and of the right of free assembly for that purpose.*
>
> "The most complete exercise of those rights is essential to the full, fair and untrammeled operation of the electoral process. To the extent that they are curtailed the electorate is deprived of information, knowledge and opinion vital to its function."

Section 610, by its flat prohibition of expenditures for political expression, cripples expression itself and seriously frustrates "the First Amendment goal of producing an informed public capable of conducting its own affairs . . . ." *Red Lion Broadcasting Co. v. F. C. C.,* 395 U. S. 367, 392 (1969).

Legislation such as § 610 which, on its face and in specific application, restricts the exercise of the freedoms

of speech, press, petition and assembly guaranteed by the First Amendment does not come before this Court with the usual presumption of constitutionality. *Thomas v. Collins,* 323 U. S. 516, 530 (1945); *Thornhill v. Alabama,* 310 U. S. 88, 95 (1940); *Schneider v. State,* 308 U. S. 147, 161 (1939). Rather, the presumption is that it is unconstitutional. *United States v. C. I. O.,* 335 U. S. 106, 140 (1948) (concurring opinion of Mr. Justice Rutledge); cf. *United States v. Carolene Products Co.,* 304 U. S. 144, 152, n. 4 (1938). Such legislation is subjected to "close judicial scrutiny" and must satisfy rigorous standards. Paramount among these standards is the requirement that legislation touching the exercise of First Amendment rights be narrowly drawn to meet the precise evil the legislation is intended to curb. *Cantwell v. Connecticut,* 310 U. S. 296 (1940); *Thornhill v. Alabama,* 310 U. S. 88 (1940); *Schneider v. State,* 308 U. S. 147 (1939); *DeJonge v. Oregon,* 299 U. S. 353 (1937). As the Court has frequently reiterated, "[b]road prophylactic rules in the area of free expression are suspect . . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *N. A. A. C. P. v. Button,* 371 U. S. 415, 438 (1963); *United States v. Robel,* 389 U. S. 258, 265 (1967); see *California v. LaRue,* 409 U. S. 109, 125-126 (dissenting opinion of Mr. Justice Marshall); *Aptheker v. Secretary of State,* 378 U. S. 500 (1964); *Shelton v. Tucker,* 364 U. S. 479 (1960).

Wholesale abolition of First Amendment rights by a statute flatly prohibiting expenditures for speech cannot survive these tests. As the Court said in *DeJonge v. Oregon, supra,* 299 U. S. at 364-365, "These rights may be abused by using speech and press or assembly in order to incite to violence and crime. The people through the legislatures may protect themselves against that abuse.

But the legislative intervention can find constitutional justification only by dealing with the abuse. *The rights themselves must not be curtailed.*" A statute which places a complete ban on corporate expenditures for expression on public issues violates the fundamental requirement that, in dealing with a permissible subject of legislation which is closely intertwined with the exercise of First Amendment rights, Congress must adopt the least drastic means. See *California v. LaRue,* 409 U. S. 109, 132 (1972) (dissenting opinion of Mr. Justice Marshall); *United States v. Robel,* 389 U. S. 258, 268 (1967); Note, *Less Drastic Means and the First Amendment,* 78 YALE L. J. 464 (1969).

On its face and as construed by the Court of Appeals, § 610 strikes at the very heart of protected expression. The statute not only may outlaw expenditures for the innocuous advertising involved in this case, which does not even mention the name of any political party or the name of any candidate for election to federal office. In *United States v. International Union United Auto Workers, supra,* the majority strongly implied that the prohibition of an expenditure made for the purpose of influencing the nomination for election, or election, of persons to federal office for advertising which "simply state[s] the record of particular candidates on economic issues" could not be sustained under any circumstances. 352 U. S. at 592. Section 610, on its face and as construed by the Court below, would include within its scope such an expenditure.

The statute would also outlaw an expenditure by a newspaper for the publication of an election-day editorial endorsing particular candidates for election to federal office. In *Mills v. Alabama,* 384 U. S. 214 (1966), however, the Court struck down just such a statute in voiding, on First Amendment grounds, an Alabama statute which prohibited election-day newspaper editorials urging read-

ers to vote in a particular way. Since no valid distinction may be drawn for First Amendment purposes between a political editorial and a paid political advertisement, § 610 is likewise invalid. *United States v. The National Committee for Impeachment, supra,* 469 F. 2d at 1140 n. 12, 1142 n. 15; *United States v. Painters Local Union No. 481, supra,* 172 F. 2d 854, 856.

A clearer example of unconstitutionally overbroad legislation is difficult to imagine. Obviously, no attempt has been made to draw the statute narrowly to curb the precise evil Congress intended to curb. The statute evidences none of the "precision of regulation" which this Court has said "must be the touchstone in an area so closely touching our most precious freedoms." *N.A.A.C.P. v. Button, supra,* 371 U. S. at 438.

The actual application of § 610 to protected speech, illustrated in the case at bar, is not its only vice. The statute shares the further characteristics of overbroad legislation. It has a clear deterrent impact or "chilling effect" on the exercise of constitutionally protected rights. See Note, *The First Amendment Overbreadth Doctrine,* 83 HARV. L. REV. 844, 853 (1970), and its imprecision invites arbitrary and discriminatory enforcement. *Grayned v. City of Rockford,* 408 U. S. 104, 108 (1972); *Papachristou v. City of Jacksonville,* 405 U. S. 156, 162 (1972); *Coates v. Cincinnati,* 402 U. S. 611, 614 (1971). The broad administrative discretion, which the construction adopted by the majority below would allow, would itself be incompatible with the First Amendment, which requires that administrative standards regulating free expression be narrow and clear. See, e.g., *Kunz v. New York,* 340 U. S. 290 (1951); *Saia v. New York,* 334 U. S. 558 (1948); *Cantwell v. Connecticut,* 310 U. S. 296 (1940); *United States v. National Committee for Impeachment,* 469 F. 2d 1135, 1142 (1972).

The clear warnings this Court has given concerning § 610 have been largely ignored by Congress. Despite the prior opinions of the Court in *C. I. O.* and *International Union United Auto Workers,* Congress has made no attempt to narrow the indiscriminate sweep of this restrictive provision, except for a crabbed accommodation of the narrow holdings of those cases in the FECA amendment to § 610. Indeed, the term "*influencing,*"—chosen as the central term for use in the new definition of "expenditure" in § 591(f)(1)—is the same term this Court has repeatedly been forced to narrow in legislation affecting the exercise of First Amendment rights. *United States v. Harriss,* 347 U. S. 612 (1954); *United States v. Rumely,* 345 U. S. 41 (1953). On its face and as construed by the Court below, the statute is inherently hostile to "the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan,* 376 U. S. 254, 270-271 (1964).

The constitutional deficiencies of the offered rationale for such legislation were examined at length by Justice Rutledge in his concurring opinion in *C. I. O.* and are well-known.

It is argued that the governmental interest in maintaining the purity of elections from "undue influence" of labor unions and corporations justifies such legislation. But as Justice Rutledge observed, it is a fallacy to suppose that in *regulating* political expression, Congress may *abolish it altogether.* This is what § 610 does. And by what right does Congress regulate "undue influence" in political expression, at all, in the face of the command that "Congress shall make *no law* . . . abridging the freedom of speech, or of the press . . ."? Again, as Justice Rutledge pointed out in *C. I. O.* (335 U. S. at 145-146) ". . . 'undue influence' in this connection may represent no more

than convincing weight of argument fully presented, which is the very thing the Amendment and the electoral process it protects were intended to bring out . . . . But even if the right to sway others by persuasion is assumed to be subject to some curtailment, in the interest of preventing grossly overbalanced presentations, that right cannot be wholly denied . . . nor can it be restricted beyond what is reasonably and clearly necessary to correct an evil so gross and immediate that the correction indubitably outweighs the loss to the public interest resulting from the restriction." Section 610's solution is not one based on carefully drawn regulation; it is flat prohibition. The undue influence rationale proceeds on the paternalistic premise that the people are unable to attend properly to their own governmental affairs without intervention by the government. The First Amendment is predicated on the different and fundamentally conflicting philosophy that the people are able through free and open debate to consider and resolve their own destiny. As Mr. Justice Powell said in *Saxbe v. Washington Post Co.*, — U. S. — (No. 73-1265 June 24, 1974) "[i]t embodies our Nation's commitment to popular self-determination and our abiding faith that the surest course for developing sound national policy lies in a free exchange of views on public issues. And public debate must not only be unfettered; it must also be informed. For that reason this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression. *Kleindienst v. Mandel*, 408 U. S. 753, 762 (1972); *Red Lion Broadcasting Co. v. F. C. C.*, 395 U. S. 367, 390 (1969); *Lamont v. Postmaster General*, 381 U. S. 301 (1965); *Martin v. City of Struthers*, 319 U. S. 141, 143 (1943)." The rationale of §610's prohibition cannot be reconciled with the First Amendment.

The suggestion that "protection" of disagreeing stockholders could supply a sufficient reason for the drastic effect of §610's flat prohibition of expression on public issues was also analyzed and rejected by Mr. Justice Rutledge in *C. I. O.* As he observed, "[t]he expression of bloc sentiment is and always has been an integral part of our democratic electoral and legislative processes. They could hardly go on without it." 335 U. S. at 143-144. As the majority said in *C. I. O.*, if the statute "were construed to prohibit the publication, by corporations . . . in the regular course of conducting their affairs, of periodicals advising their stockholders or customers of danger or advantage to their interests from the adoption of measures or the election to office of men espousing such measures, the gravest doubt would arise in our minds as to its constitutionality." 335 U. S. at 121. If the asserted interest in "protection" of disagreeing stockholders does not rise to constitutional dimension to justify prohibition of communication to stockholders and customers, it plainly cannot rise to constitutional dimension to justify prohibition of expression on public issues when the intended recipients of the speech are the intended beneficiaries of the protection of expression afforded by the First Amendment, the public at large. The suggestion that the asserted interest of the disagreeing stockholders may be magnified to the point where that interest overrides an interest of constitutional dimension, the interest in preserving the free exchange of views on public issues and, with it, "the ability of our people through free and open debate to consider and resolve their own destiny" cannot be reconciled with the First Amendment.[33]

33. Fundamentally different constitutional questions may be presented regarding expression of bloc sentiment where membership in the group is governmentally required. See *Lathrop v. Donahue*, 367 U. S. 820 (1961); *International Association of Machinists v. Street*, 367 U. S. 740 (1961); *Railway Employees' Department v. Hanson*, 351 U. S. 225 (1956). Such considerations are not involved in this case.

As has been said before, if within the firstness of the First Amendment, there is a firstness also among the interests fostered by the Freedom of Speech and of the Press Clause, then it is the interest in the flow of politically relevant information to the public, and this essential of self-government cannot be destroyed by a sweeping prohibition which effectively silences important segments of the community and prevents debate on public issues.

For these reasons, the Court should declare § 610 unconstitutional and void as violative of the First Amendment.

IV. On Its Face and as Construed and Applied by the Court Below Section 610's Prohibition, Directed Only Against Contributions and Expenditures by Labor Unions and Corporations, Deprives Labor Unions and Corporations of Equal Protection of the Laws in Violation of the Fifth Amendment.

Although the Fifth Amendment contains no express equivalent of the Equal Protection Clause of the Fourteenth Amendment, it has been recognized that the right to equal protection of the laws is embraced within the scope of Due Process. It is settled that the federal government, under the Fifth Amendment Due Process Clause, has no greater license to create discriminatory classifications than do the states under the Equal Protection Clause of the Fourteenth Amendment. *Korematsu v. United States*, 323 U. S. 214, 234-235 (1944), *rehearing denied*, 324 U. S. 885; *United States v. Petrillo*, 332 U. S. 1 (1947); *Bolling v. Sharpe*, 347 U. S. 497 (1954), *opinion supplemented*, 349 U. S. 294 (1955).

It is well-established that a corporation is a "person" within the meaning of the Equal Protection Clause of the Fourteenth Amendment, and entitled to its full protection, *Grosjean v. American Press Co., Inc.*, 297 U. S. 233, 244 (1936); *Louis K. Liggett Co. v. Baldridge*, 278 U. S. 105 (1928); *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389 (1928); *Safeguard Mutual Insurance Co. v. Miller*, 472 F. 2d 732 (3d Cir. 1973). Corporations have a corresponding claim for equal protection of the laws under the Fifth Amendment, as against the federal government. *Jim Young Develop. Corp. v. State Highway Commission of Missouri*, 56 F. R. D. 38, 41 (W. D. Mo. 1971).

Section 610's prohibition of contributions and expenditures in connection with federal elections creates an unjustifiable discrimination in treatment of corporations and labor unions and does so in an area involving the exercise of fundamental rights. Since the classification thus created pertains to fundamental rights the constitutionality of § 610 must be judged by the standard of "close judicial scrutiny." *Shapiro v. Thompson*, 394 U. S. 618 (1969). "Classifications that discriminate against the exercise of constitutional rights per se . . . must be supported by a 'compelling' governmental purpose. . . ." *California v. La Rue*, 409 U. S. 109, 138 (1972) (dissenting opinion of Mr. Justice Marshall); *Police Department of Chicago v. Mosley*, 408 U. S. 92, 99 (1972).

Under § 610, the operative distinctions are (1) the content of the expression and (2) the identity of the speaker. However, "[a]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Department of Chicago v. Mosley, supra*, 408 U. S. at 95; *Cohen v. California*, 403 U. S. 15, 24 (1971); *Street v. New York*, 394 U. S. 576 (1969); *New York Times Co. v. Sullivan*, 376 U. S. 254, 269-270 (1964), and cases cited; *N. A. A. C. P. v. Button*, 371 U. S. 415, 445 (1963); *Wood v. Georgia*, 370 U. S. 375, 388, 389 (1962); *Terminiello v. Chicago*, 337 U. S. 1, 4 (1949); *De Jonge v. Oregon*, 299 U. S. 353, 365 (1937).

Equal Protection moreover requires that statutes affecting First Amendment interests be *narrowly tailored* to their legitimate objectives. *Police Department of Chicago v. Mosley, supra,* 408 U. S. at 101; *Williams v. Rhodes,* 393 U. S. 23 (1968).

These are standards which § 610 cannot satisfy. There is neither a compelling governmental interest nor a rational interest which justifies classification of labor unions and corporations for the purpose of drastically limiting their rights to contribute to the operation of the democratic process. Section 610 does not prohibit voluntary associations, partnerships or the numerous large, unincorporated business organizations such as real estate investment trusts and other types of unincorporated trust organizations from making political contributions or from making expenditures in connection with federal elections. Section 610 does not prohibit contributions and expenditures by medical or farm organizations or any of the other types of organizations which become active in politics.

There is no characteristic either of the corporate form of organization or of labor unions which makes § 610's prohibition peculiarly appropriate as applied to them and not to other organizations. No interest justifies its selective restriction of the right of participation in governmental processes. This discriminatory provision, the very object of which is selectively to silence and sterilize politically two important segments of the community, cannot be reconciled with the guarantee of equal protection of the laws and has no place in an open society.

CONCLUSION.

For all of the foregoing reasons, Petitioners respectfully request that the Judgment of Court of Appeals for the Third Circuit be reversed.

Respectfully submitted,

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APPENDIX A.

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18 U. S. C. § 610. Contributions or expenditures by national banks, corporations or labor organizations.

It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.

Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

For the purposes of this section "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Federal Election Campaign Act of 1971, P. L. 92-225.

Title II, Section 205:

Section 610 of title 18, United States Code, relating to contributions or expenditures by national banks, corporations, or labor organizations, is amended by adding at the end thereof the following paragraph:

"As used in this section, the phrase 'contribution or expenditure' shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; but shall not include communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject; nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families; the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization: *Provided,* That it

shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction."

Federal Election Campaign Act of 1971, P. L. 92-225.

Title II, Section 201:

Section 591 of title 18, United States Code, is amended to read as follows:

§ 591. Definitions.

"When used in sections 597, 599, 602, 608, 610, and 611 of this title—

"(a) 'election' means (1) a general, special, primary, or run-off election, (2) a convention or caucus of a political party held to nominate a candidate, (3) a primary election held for the selection of delegates to a national nominating convention of a political party, (4) a primary election held for the expression of a preference for the nomination of persons for election to the office of President, and (5) the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States;

"(b) 'candidate' means an individual who seeks nomination for election, or election, to Federal office, whether or not such individual is elected, and, for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or

election, to Federal office, if he has (1) taken the action necessary under the law of a State to qualify himself for nomination for election, or election, or (2) received contributions or made expenditures, or has given his consent for any other person to receive contributions or make expenditures, with a view to bringing about his nomination for election, or election, to such office;

"(c) 'Federal office' means the office of President or Vice President of the United States, or Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States;

"(d) 'political committee' means any individual, committee, association, or organization which accepts contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000;

"(e) 'contribution' means—

"(1) a gift, subscription, loan, advance, or deposit of money or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business), made for the purpose of influencing the nomination for election, or election, of any person to Federal office, for the purpose of influencing the results of a primary held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President, or for the purpose of influencing the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States;

"(2) a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make a contribution for such purposes;

"(3) a transfer of funds between political committees;

"(4) the payment, by any person other than a candidate or political committee, of compensation for the personal services of another person which are rendered to such candidate or political committee without charge for any such purpose; and

"(5) notwithstanding the foregoing meanings of 'contribution', the word shall not be construed to include services provided without compensation by individuals volunteering a portion or all of their time on behalf of a candidate or political committee;

"(f) 'expenditure' means—

"(1) a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business), made for the purpose of influencing the nomination for election, or election, of any person to Federal office, for the purpose of influencing the result of a primary held for the selection

of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President, or for the purpose of influencing the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States;

"(2) a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make any expenditure; and

"(3) a transfer of funds between political committees;

"(g) 'person' and 'whoever' mean an individual, partnership, committee, association, corporation, or any other organization or group of persons; and

"(h) 'State' means each State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.".

"I say let's keep the campaign honest. Mobilize 'truth squads'..."

Stewart S. Cort, *Chairman*
Bethlehem Steel Corporation



"Why do I see this need? Because several months ago we lived through a number of political primary campaigns. And it ought to be clear to all of us that there have been times when truthfulness took an awful beating. And now we have a presidential campaign ahead, during which we can clearly see a lot more of the same.

"I'm thinking of the careless rhetoric and accusations that are being thrown around these days—their main target being the business community.

"Right now, look at every candidate's declared political programs. Analyze every issue. If you think any of them are faulty, ill-founded, or misleading, prepare your own answers and use those answers to set the record straight. I'd suggest that groups with a deep interest in good government organize programs to encourage responsible, honest, and truthful campaigning. Mobilize "truth squads," perhaps.

"One thing you can do is talk in advance with the communications media in your area—newspaper publishers, editors, reporters, radio and television people, and magazine publishers. Alert them to the kinds of false statements that are likely to be made and show them how and why those statements are false or deceptive. Give them the facts. They're likely to take a highly responsible position in reporting what the politicians say if they're forewarned.

"And when outrageous accusations are reported in the media, you ought to refute them immediately. You can do it if you're properly prepared. Plan to attend political functions and stand up when spokesmen are off base. Concerned citizens ought to do this; it's nothing more than true democracy in action."

From a talk "SPEAK OUT FOR TRUTH" to the Rotary Club, Jacksonville, Florida.

As an example of the careless rhetoric and accusations about the business community, Mr. Cort quoted the following statement made by a political candidate: "The time has come for a tax system that says to big business--you must pay your fair share."

His answer: "That's a reasonable demand, but it implies that we aren't already paying our 'fair share.' My own company has been tagged with that sort of accusation despite the fact that over the past 10 years our taxes have averaged $37 million a year more than our net income. Our total tax expense was nearly $200 million last year, $155 million in 1970, and more than $1.7 billion for the 10 years from 1962 through 1971.

"So please think twice before swallowing all this baloney about large corporations not carrying their fair share of the tax burden."

If you would like a copy of Mr. Cort's entire speech "SPEAK OUT FOR TRUTH," and if you would like a folder telling how to go about activating *Truth Squads*, write: Public Affairs Dept., Bethlehem Steel Corporation, Bethlehem, PA 18016

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SPEAK OUT FOR TRUTH

by

STEWART S. CORT
Chairman
Bethlehem Steel Corporation

Rotary Club
Jacksonville, Florida
June 12, 1972



Stewart S. Cort

The title of my talk consists of four words of advice: "Speak Out For Truth."

Why do I see this need? Because we've recently lived through a number of political primary campaigns—in Florida and in my own state, Pennsylvania—and it ought to be clear to all of us that there have been times when truthfulness took an awful beating. And now we have a long presidential campaign ahead, during which we can clearly see a lot more of the same.

I'm thinking of the careless rhetoric and accusations that are being thrown around these days—their main target being the business community. I'll give you a few examples of what I have in mind:

In a recent speech in Pittsburgh, a prominent presidential candidate said this: "What you have in Washington today is government of the money, by the money, and for the money. We're going to drive the money-changers out of the temple."

At a conference in Washington last month a potential presidential candidate said this: "To me, the ITT case says it all. The doors of the White House are open wide to every chairman of the board, but they are closed tight to the American working man."

As for business taxation, one of the candidates said this: "The time has come for a tax system that says to big business—you must pay your fair share."

That's a reasonable demand, but it implies that we aren't already paying our "fair share." My own company has been tagged with that sort of accusa-

tion despite the fact that over the past 10 years our taxes have averaged $37 million a year more than our net income. Our total tax expense was nearly $200 million last year, $155 million in 1970, and more than $1.7 *billion* for the 10 years from 1962 through 1971.

So please think twice before swallowing all this baloney about large corporations not carrying their fair share of the tax burden.

But corporations aren't the only targets. One candidate talks about "$28 billion in tax loopholes for the rich and powerful" and he calls for tax reform and other economic policies that, in the words of Chet Huntley, are "far to the left of Norman Thomas."

Put it all together and you'll see, as many observers have already warned, that business enterprise is sure to be a major issue during the upcoming presidential campaign. It's bound to be; the temptation is irresistible, at least to anyone who puts political advantage above all else.

As is perfectly clear to you, I don't share the views of those extreme critics of our society. But I certainly do admit that severe criticism is very much in fashion. It has all the earmarks of a vote getter. It'll get votes from the ideological extremes, from both extremes. It'll get votes from those who are terribly disillusioned, frustrated, and fearful. And it'll get votes from people who don't have that one commodity that has always sustained the American people, no matter how unhappy their circumstances —I refer to hope.

A campaign based on cynicism and mistrust will surely meet some measure of success because the way has been cleared by an army of malcontents. They've filled the bookshelves with volumes calling our society *The Sick Society*; branding the nation as *America, Incorporated*; saying we victimize the public *In The Name of Profit* and

deploring what has been called "Consciousness I and II." The illness and the cure are documented in what has been titled *A Populist Manifesto*.

And, when the Committee for Economic Development issued a booklet urging all business firms to accept a high degree of social responsibility, it was greeted with these words, written by one of the most prominent columnists for one of the country's most prominent newspapers:

> "The mania of maximization of profit seems to turn businessmen into economic Richard Specks, people so demented that they will have that last dollar although, if they were sane, they'd know that to make it they must sacrifice their own physical health and well-being."

With that sort of propaganda flooding us, no wonder a recent survey found that 46 percent of all Americans think big business is "dangerous to our way of life." This is plain nonsense. Would nearly every American family have a car if it weren't for so-called "big business"? Would we have telephones and television and indoor plumbing in most homes? Would we have the levels of education and nutrition and health care that, however imperfect, are the envy of most human beings elsewhere on this planet?

Well, I won't take your time defending "big business." Even when the critics aim their blasts at "big business," the fallout injures all businesses, big and small, and a lot of citizens who aren't even "businessmen."

Is this of any concern to you? You bet it is! Consider, for a moment, the current epidemics of shoplifting and vandalism. Sure, we've always had to contend with larceny and destructive individuals, but has this kind of conduct ever before been condoned by whole groups in our society? Today the so-called "rip-off" has become a sort of art form and

a folk religion.

Are businessmen the only ones who suffer because of shoplifting? You know the answer. We all suffer because of the resulting higher prices. We all pay the high costs of preventing vandalism and repairing its damages.

And let me read you a sad little item that appeared in one of our local newspapers on May 13th:

> "The owners of a shop in Allentown wanted to run a store which sold things to kids at reasonable prices, that didn't 'rip-off' the customers. In appreciation, the shoplifters went to work on them. 'The kids steal anything they can get their hands on and put in their pockets,' said one proprietor. 'We try to sell things at a low price, but it seems some people just have to steal'."

I don't think I have to add anything to that newspaper story. It speaks for itself. Ask yourself whether the situation will improve, or get worse, if the upcoming political campaign features the nation's leading politicians preaching that business is evil, that it makes excessive profits by gouging and cheating and deceiving the American public. It's something to think about.

Now let's take a look at another specific issue that ought to concern you and me. Everybody's talking about tax reform, but watch out for rhetoric about "closing the loopholes" that only benefit "the rich and powerful." As *The Wall Street Journal* commented the other day, one of the biggest so-called "loopholes" is the provision enabling homeowners to deduct mortgage interest and property taxes from Federal taxable income.

Well, there are many millions of homeowners in this country and they aren't all "rich and powerful." Most of them are just ordinary citizens. And, as a matter of fact, I always thought there was a

sound public policy behind those deductions—to encourage people to own their own homes. Take the deductions away and I doubt you'd prevent wealthy people from owning homes, but you'd surely make it tough on everybody else.

And, talking about personal income taxes, is there a single person here who thinks his taxes are too low? Well, there are candidates who think they're *way* too low.

And that's only the beginning. There are proposals to virtually confiscate inheritances over a certain amount; to end the tax exemption for state and municipal bonds; to reduce depletion and depreciation allowances; to outlaw the tax limitations on capital gains—you name it, somebody's talking about it.

But there's no need for me to go on and on. You've heard all those proposals, and I hope you see them as I do—not so much as threats to people who are wealthy, but threats to everyone who asks nothing more than the same opportunities that Americans have always had.

In fact, the avowed purpose of all those proposals is to give the government even greater power to redistribute income.

Now, don't get me wrong. The stated objectives are very worthy—to use that power to stamp out poverty; to improve health care; to provide jobs for every American; to eliminate the inequities in our society.

All those aims are wholly admirable and we should strive to achieve them. But is this the way to do it? I can't imagine how destroying individual incentive and confiscating savings can possibly provide more employment. It would, in fact, have the opposite effect.

But I won't quibble over specific points. Let me focus on the broadest aspect of this thing, and

that's the really important issue. What I have in mind is nothing less than individual freedom. The kind of collectivized society those people are talking about is the greatest threat on earth to our freedom.

In mid-May William F. Buckley gave a talk in my community. I wasn't able to attend, but the next morning's paper reported this:

> "Mr. Buckley said there is an increasing tendency of Americans to trade in their many freedoms for bits of economic and social security."

How right he is! Now, just by coincidence, another article appeared in the very same edition of the paper. It was a dispatch from the *Times* of London; maybe it appeared in your local papers.

It summarized a report from Sweden, and Sweden, as you probably know, is the most highly socialized country in the western world. The headline of this article was: "Sweden has harsh, ruthless society, report confirms."

The Swedes have free health care and cradle-to-grave security. But what does it cost them?

They have just about the highest prices in the world; they consume more alcohol per capita than any other people in the world; and they are suffering what amounts to an epidemic of mental breakdowns.

In the interests of equality, most things in Sweden are standardized. In the words of the report: "It is true that if you have seen one Swedish town, you've seen them all .... Swedish flats and houses are so much alike that you can enter any kitchen in the country and usually know where the rubbish bin is located." How'd you like living under those conditions?

But here's the worst part of it. Listen to this: "Many observers believe that some chilling aspects of the '1984' society appeared in Sweden several years ago." This type of society, writes the Swed-

ish psychiatrist who prepared the report, "leads to a prodigious, human-crushing process."

Is that what the so-called "populist" movement in America really wants—to crush the human spirit? One of the great ironies of it all is that the populist movement is seen as a rebirth of Jeffersonian philosophy. Now, that's a strange thing, because I've checked into what Thomas Jefferson thought this country is all about, and his ideas are remarkably fitting today.

Listen to these words on taxation and government spending, written in 1816:

> "... private fortunes are destroyed by public as well as by private extravagance. And this is the tendency of all human governments .... till the bulk of society is reduced to mere automatons of misery, to have no sensibilities left but for sinning and suffering .... And the fore horse of this frightful team is public debt. Taxation follows that, and in its train wretchedness and oppression."

As sure as I'm standing here, the economic programs now being preached by some political candidates would, if implemented, bring an end to democracy and freedom as we know it in this land, not overnight, but in the foreseeable future.

This is not to say that continual and gradual changes in our society aren't needed, and needed badly. There's still a lot of inequity in our land; there's a lot of poverty; there's a lot of suffering that must be remedied. But we must find a way to do it that doesn't stop our economy in its tracks—a way that doesn't wipe out the individual liberties that have made us a proud country, with every right to be proud.

That's more than enough moralizing. I'm not a philosopher; I'm a practical man. And that's why

I'd like to give a few practical suggestions. The political campaigns are coming. And, as I've pointed out, we know what a lot of the candidates are going to be saying. I say, let's keep them honest.

Right now, look at their declared political programs. Analyze every issue. If you think any of them are faulty, ill-founded, or misleading, prepare your own answers and use those answers to set the record straight. I'd suggest that groups like this one, groups with a deep interest in good government, organize programs to encourage responsible, honest, and truthful campaigning. Mobilize "truth squads," perhaps.

One thing you can do is talk in advance with the communications media in this area—newspaper publishers, editors, reporters, radio and television people, and magazine publishers. Alert them to the kinds of false statements that are likely to be made and show them how and why those statements are false or deceptive. Give them the facts. They're likely to take a highly responsible position in reporting what the politicians say if they're forewarned.

And when outrageous accusations are reported in the media, you ought to refute them immediately. You can do it if you're properly prepared. Plan to attend political functions and stand up when spokesmen are off base. Concerned citizens ought to do this; it's nothing more than true democracy in action.

I've quoted Thomas Jefferson before and I'll quote him just one more time. It seems that Jefferson didn't like long-winded speeches. In 1824, in a letter to the president of a debating society, he said this: "Amplification is the vice of modern oratory. It is an insult to an assembly of reasonable men, disgusting and revolting instead of persuading. Speeches measured by the hour, die with the hour." That's good advice, and I'll follow it. Thank you!

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How you can help to keep the campaign honest

There are many things you can do—either as an individual, or as a member of an organization—to help promote responsible, truthful campaigning by political candidates. We urge your full participation.

Become informed. Determine what the major issues are in this year's elections—such as Vietnam, inflation, taxes, unemployment, environment, foreign affairs, busing, and law and order. Read books, magazines, periodicals, and reports to gain background; read newspapers to follow current trends. Make a habit of watching televised news programs, and listening to radio reports. Discuss the issues with your friends, neighbors, and business associates.

In addition, find out what the candidates stand for. What are their proposals and political philosophy? What have their records been on major issues? What are their qualifications for office?

Prepare. Forewarn the communications media about possible false statements that could be made by political candidates. Also, advise newspaper publishers, editors, reporters, radio and television people, and magazine publishers of any fallacies in the political programs of candidates. Use

facts and illustrations, and give them the sources of your material.

If you work for a fairly large business organization, see to it that your sales people and legislative representatives are advised to report any false or misleading statements that come to their attention, so that appropriate rebuttal can be made. Encourage your executives to accept speaking engagements and to urge their audiences to keep candidates honest.

Be inquisitive. Scrutinize articles and speeches by candidates. When you encounter a statement that seems unlikely, or is inconsistent with your own knowledge, check on it. Your sources, of course, will vary with the subject you are researching, but the following may be useful to you: The Readers Guide to Periodical Literature, and the Public Affairs Information Service at your local library include a listing of current books, magazine and periodical articles, and government documents. Also, use encyclopedias and almanacs; informational services of chambers of commerce, and other local business associations. Keep in touch with the public affairs or public relations offices of major corporations or of national organizations such as the National Association of Manufacturers, the Chamber of Commerce of the United States, and various trade associations or technical societies. Or ask the candidate himself to provide the source of his information. If the facts contradict the statement you are researching, document your sources.

Correct the record. If you are attending an open meeting at which a political candidate—or anyone else—makes a statement you know to be wrong, stand up and question him, perhaps during the question and answer session. If that is not possible, or if you hear or read such a statement in the news media, write to the candidate, the radio and television stations or newspapers which publicized the incorrect information, and perhaps to local newspapers in areas where the statement was heard

or read. Make your communications positive in tone; cite relevant facts and figures to prove your point.

Follow up. To the extent possible, check future statements of the candidate to be sure he has corrected the wrong information he has been using. If he has, write and thank him. If not, some of the following steps might be indicated: write or wire the local, state, or national leader of the candidate's political party, asking that he or she intervene; write or telephone officials of your local news media, suggesting that they prepare an editorial on the situation and that they discuss the issue in their news articles or programs. Communicate again with the candidate, telling him of the steps you have taken and strongly urging him to correct the wrong information he is using.

Talk with people. Talk with everyone with whom you come in contact about your efforts to promote responsible campaigning. Discuss the incorrect statements that have been made, and tell your listeners who made them. Encourage them to become active in their own localities.

Finally, form "Truth Squads." Involve your friends, neighbors, church groups, business organizations, civic clubs and schools in the effort to promote truthful, honest political campaigning. Divide the research and communication work among members of the Squad and meet periodically to discuss issues and projects, and to share information. Have each participant communicate with the officials suggested above in every instance where an irresponsible or incorrect statement is identified.

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